SUPREME COURT, U. S.
SEP 3 1974

Supreme Court of the United States

No. 74-225

October Term, 1974

JOHN MARSHALL AND QUEEN CITY NEWS, INC.,
Appellants,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

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JOHN MARSHALL AND QUEEN CITY NEWS, INC.,
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vs.

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ON APPEAL FROM THE SUPREME COURT OF OHIO

JURISDICTIONAL STATEMENT

Appellants John Marshall and Queen City News, Inc. appeal from the order of the Supreme Court of Ohio entered May 10, 1974, reconsideration denied June 6, 1974, which dismissed their appeal from the Court of Appeals for Hamilton County, Ohio (First Appellate District) for the reason that no substantial constitutional question was presented. The Court of Appeals for Hamilton County upheld the constitutionality of Ohio Revised Code Sections 2905.34, 2905.35 and 2905.38. The Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial constitutional question is presented.

OPINIONS BELOW

The orders of the Supreme Court of Ohio are attached as Appendix "A". The opinion of the Court of Appeals is unreported but reproduced and attached as Appendix "B", together with its opinion in the companion case of *State of Ohio v. Michael Kensinger,* which opinion is referred to by the Court of Appeals in *Queen City.*

JURISDICTION

Appellants were found guilty on September 27, 1972 in the Court of Common Pleas of Hamilton County of forty-one (41) counts of possession of obscene materials with intent to distribute the materials in violation of Ohio Revised Code Sections 2905.34 and 2905.35. The Court of Appeals of Hamilton County entered its judgment affirming the convictions on January 14, 1974. On May 10, 1974, the Supreme Court of Ohio dismissed the appeal taken by the appellants to that court and denied their motion for reconsideration on June 6, 1974. Appellants filed their Notice of Appeal to this Court in the Court of Appeals of Hamilton County, the court possessed of the record, on August 23, 1974. A copy of the Notice of Appeal is attached as Appendix "C".

The jurisdiction of this Court to review the decisions by appeal is based on Title 28 U.S. Code, Section 1257(2) in that this case draws in question the validity of statutes of the State of Ohio on the grounds of their being repugnant to the Constitution of the United States, and the decision below was in favor of their validity. Further, appellants properly invoke the jurisdiction of this Court to review other denials of their constitutional rights as

if on writ of *certiorari*. *See Flournoy v. Weiner*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

STATUTES INVOLVED

The statutory provisions under which appellants were convicted (Sections 2905.34, 2905.35 and 2905.38) were repealed, and newly enacted Sections 2907.01, 2907.32 and 2907.35 became effective January 1, 1974. However, the statutory language of the former sections that formed the basis for appellants' challenges to the constitutional validity of said sections was incorporated virtually unchanged in the new enactments. Thus, appellants' challenges to the constitutional validity of Sections 2905.34, 2905.35 and 2905.38 are applicable and relevant to, and have not been mooted by, the newly enacted statutory provisions. Copies of former Sections 2905.34, 2905.35 and 2905.38 and current Sections 2907.01, 2907.32 and 2907.35 are attached as Appendix "D".

QUESTIONS PRESENTED

1. Whether Ohio Revised Code Sections 2905.34 and 2905.35, the statutes under which appellants were charged, tried and convicted, are void for overbreadth or vagueness.

2. Whether Ohio Revised Code Section 2905.38 is void for creating an unreasonable presumption of an intent to violate the obscenity laws, an element of the offense charged.

3. Whether evidence received at trial was illegally obtained and should have been suppressed as a product of an illegal search and seizure for any or all of the following reasons:

a. Probable cause did not exist for issuance of the search warrant.

b. The search warrant failed to meet Fourth Amendment specificity requirements.

c. The search warrant was issued without a prior judicial determination of the obscenity of any of the seized materials.

d. An adversary hearing prior to the mass seizure of materials to which First Amendment protection may be claimed was constitutionally compelled.

e. The search and seizure actually conducted by officers executing the search warrant was a general search and seizure.

4. Whether the prosecution failed to prove the essential elements of its case in failing to establish that the appellants possessed guilty knowledge and guilty purpose.

5. Whether the materials forming the basis for the forty-one (41) counts upon which appellants' convictions rest are constitutionally protected expression.

6. Whether the trial court erroneously charged the jury in defining the elements of the crime charged by defining "average person" in the community to include, *inter alia*, the "young" and children".

7. Whether the trial court erroneously limited defense counsels' *voir dire* examination of the jury.

STATEMENT OF THE CASE

Appellants, Queen City News, Inc., a Delaware corporation, and John Marshall, an individual, were jointly indicted for violation of Ohio Revised Code Section 2905.35 which prohibits, *inter alia*, possession of obscene materials, as defined in Ohio Revised Code Section 2905.34, with intent to sell or distribute them. The appellants were charged with forty-one separate counts involving a phonograph record (Count 1), rubber goods (Counts 2 and 3), motion picture films (Counts 4, 5 and 6) and paperback books and magazines (Counts 7 through 41).

In the Court of Common Pleas, Hamilton County, appellants sought by pretrial motion, *inter alia*, to dismiss the indictment because of the unconstitutionality of Ohio Revised Code Sections 2905.34 and 2905.35, and because the materials charged to be obscene in the indictment were, in fact and law, constitutionally protected. Further, appellants moved to suppress and return the materials seized by law enforcement authorities upon which the indictment was grounded. The testimony at the pretrial hearing (R. 74-159)[1] on the motion to suppress evidence established that on January 19, 1972, a police officer met with an informant whom he had never seen before (R. 85). Although he had never received information from the informant (R. 85) or discussed his reputation for giving reliable information with anyone before (R. 85), although the assistant county prosecutor who introduced the informant to the officer could not vouch for his reliability (R. 141), and both knew that the informant was then under indictment for another offense (R. 94, 141), the officer

1. "R. ..." refers to pages of the record of the state trial court proceedings.

took him at his word (R. 87). The informant said he was a former employee of Queen City News, Inc. (R. 85-86), that at its address in Blue Ash, Ohio, it had in its warehouse "pretty raunchy" (R. 124) books, magazines, films and rubber goods for the purpose of distributing them to retail outlets in Cincinnati and other cities (R. 102, 122). He described the location of the office and warehouse of the company, the electric lock controlled from inside (R. 122-123), and the general location of books and magazines (in the warehouse) and films and rubber goods (in the filing cabinet) (R. 102).

At about 4:00 p.m. that day, in the company of another officer, the informant and the interrogating officer went to the company's location in Blue Ash (R. 103). Although the informant apparently attempted entry to the premises, he was turned away (R. 78-79, 83, 118-119). The officers and the informant left and returned again in the evening when the building was unoccupied (R. 79, 103). With neither permission of an occupant nor a warrant, one of the officers went to the loading dock at the rear of the premises occupied by Queen City News, climbed up a wall (R. 91), hoisted himself on to the loading platform some 3 1/2 ft. off the ground and peered into a window in the overhead garage door (R. 80, 81). Although sundown had occurred earlier that evening (R. 152), the lights were off (R. 80) and there was no direct lighting from the interior of the warehouse (R. 97), he saw cartons of books on the floor (R. 98) and several metal cabinets (R. 88). Whatever was in the metal cabinets could not be seen from the officer's vantage point (R. 88-89), nor could he identify any more than a single title among the cartons of books in view (R. 98). That book, *Sex in America,* was one the officer thought he had seen before in connection with a previous investigation and prosecution

(R. 92), knew it to be obscene (R. 92), but was unable to tell whether the volume he had seen before was identical to the one he saw in the warehouse (R. 101), nor whether there had been a previous judicial determination of its obscenity (R. 92-93). Moreover, he admitted he had never previously read the book (if indeed it was the same volume), but had merely paged through it (R. 91, 100). Armed with this information, the officer and the assistant prosecuting attorney appeared before a judge of the Common Pleas Court the following day seeking a search warrant (R. 104-106, 76). The police officer executed an affidavit before the court (Deft. Ex. 1, R. 75-76), provided the judge with a book titled *Sex in America* previously seized from some other source (R. 95), and the name of the informant written on a piece of paper (R. 105).

The affidavit alleged that on January 19, 1972, Queen City News, Inc. had possession of "obscene and pornographic" books, magazines, films and rubber goods "without redeeming social value and the sole dominant appeal (sic) is to prurient interest", for sale to various retail outlets, all "in violation of Section 2905.34, Revised Code, to Section 2905.38, Revised Code".

The record is void of further facts upon which the affiant relied in concluding that appellants were violating the law.

On the basis of the affidavit, the book and the slip of paper, and without a showing of a single object taken from the warehouse (R. 87-88), the court issued the search warrant (Deft. Ex. 2, R. 75). The warrant authorized a daytime entry into the warehouses and offices of Queen City News, Inc. to search for and seize unspecified personal property—unidentified "obscene and pornographic" books, magazines, films and rubber goods "and other tan-

gible things", "without redeeming social value and the sole dominant appeal (sic) is to prurient interest." Shortly after the issuance of the warrant, officers arrived with a crowbar and forcibly broke the door to gain entrance into the warehouse of Queen City News (R. 145).

The officers disbursed into different parts of the warehouse and began rummaging through its contents (R. 111). No one gave or was given any direction as to what should be seized (R. 111). They were only told that they were to look for obscene material and each officer was left to his own discretion as to what to seize (R. 112-113, 115-116, 146). In all, about 1,400 separate items, including books, magazines, films, phonographic records and rubber goods were seized and taken from the premises in a pick-up truck (R. 112, 147).

Upon a hearing of the foregoing evidence, the court overruled the defense motion to suppress (R. 159-160), as well as the other pre-trial motions (R. 159).

Upon the empaneling of the jury (R. 181-564), defense counsel attempted to probe the attitudes of the prospective jurors regarding contemporary community standards of depiction of sexual material (R. 269, 270, 304, 305, 326, 352-353, 355, 398, 447, 494, 594, 606), shifting views of frankness in the depiction of sexual subjects (R. 306, 307, 351-352, 363-364, 391-392, 397, 594), morality of depiction of sexual subject matter (R. 274, 284, 300, 340, 353-354, 399, 434, 477-478, 606-607), and depth of feelings regarding obscenity or depiction of sexual subjects (R. 271, 334, 362, 363, 425, 461, 463, 476, 489, 494, 551). They also attempted to probe the prospective jurors' attitudes about determining the dominant theme of a book as a whole (R. 310, 327), and the redeeming social value required to justify a sexually-oriented publication (R. 309, 327-328) and whether

societal standards of permissible material vary depending upon whether the distribution is to adults or children (R. 339). They sought to determine the prior experience of the prospective jurors in viewing sexual and violent portrayals in books and pictures (R. 271, 315, 334, 335, 337, 338, 362, 363, 379-389, 425-426, 432, 481, 489), their understanding of their role as jurors in an obscenity case (R. 276, 282, 284, 287, 291-292, 379-380, 397, 398, 512, 606), and their attitudes about freedom of expression (R. 340), censorship (R. 438, 495) and the expertise of the police in determining obscenity (R. 356). The trial court refused to permit defense counsel to pursue such *voir dire* examination. Defense counsel objected strenuously to the strictures placed upon their interrogation of the jury panel, but to no avail (R. 394-395, 461).

When the state rested its case (R. 808), defendants moved for dismissal of the charges, *inter alia,* upon the ground that the state had failed to sustain its burden of proof with respect to the essential elements of the charged offenses (R. 809-811), including its failure to prove intent to distribute the materials (R. 816). All defense motions were overruled (R. 825).

For his case, appellant Marshall produced three expert witnesses (R. 827-930, 930-1014, 1014-1068) who had examined each of the materials in the indictment. They testified that each of the books, magazines, films and rubber goods had social value, that their dominant themes did not appeal to prurient interest, nor go substantially beyond contemporary community standards in depicting sexual subjects. Defendants renewed their motions for directed verdict of acquittal (R. 1070-1077, 1080), and once again the court overruled them all (R. 1081).

After argument, the court charged the jury (R. 1171-1188). The court, *inter alia,* read to the jury from Ohio

Revised Code Sections 2905.35 and 2905.34 (R. 1176-1177) and 2905.38 (R. 1179), and identified the "average person in the community" and the "contemporary national community" to include "the community as a whole, young and old . . . men, women and children" (R. 1180-1181). The defense took constitutional exception, *inter alia,* to the court's use of the aforementioned sections of the Ohio Revised Code, and in its charge to the jury (R. 1189, 1193), and to the Court's inclusion of children in its definition of the average man in the contemporary community (R. 1188, 1194). The jury returned a verdict of guilty on all counts as to each of the defendants (R. 1202-1203, 1205-1207). Motion for new trial was overruled by the trial court (R. 1212) and the defendants were sentenced (R. 1220). The individual defendant was sentenced to one year imprisonment and $500.00 fine for each count, a total fine of $20,500.00 (R. 1220). The corporate defendant was sentenced to the maximum fine of $5,000.00 for each count, a total fine of $205,000.00 (R. 1220).

In the assignments of error to the Court of Appeals, appellants argued, *inter alia,* that the trial court erred in overruling their motions to dismiss on the ground that the sections upon which the indictment was based violated the United States Constitution, erred in overruling their pretrial motion to suppress evidence, erred in overruling their motion to dismiss on the ground that the materials were constitutionally protected expression, erred in overruling their motion for acquittal upon the ground that the prosecution failed to prove guilty knowledge and guilty intent, erred in overruling defendant's objections to the Court's charge to the jury, and erred in limiting defense counsels' *voir dire* examination of the jury. The Court of Appeals, First Judicial District, Hamilton County, Ohio affirmed the convictions.

Appellants sought leave to appeal the affirmance of their convictions by the Court of Appeals to the Supreme Court of Ohio. In support thereof, appellants, in their written memorandum in support of jurisdiction, set forth, *inter alia,* the issues that had been presented to the appellate court for consideration. On May 10, 1974 the Supreme Court of Ohio denied appellants' leave to appeal on the ground that no substantial constitutional question was presented. Appellants filed their motion for reconsideration on May 17 and on June 6, 1974 the Court affirmed its decision.

THE QUESTIONS ARE SUBSTANTIAL

I. OHIO REVISED CODE SECTIONS 2905.34 AND 2905.35 ARE UNCONSTITUTIONAL.

Ohio Revised Code Section 2905.35 (compare successor Section 2907.32) upon which the convictions of appellants rest prohibits, *inter alia,* the sale of obscene materials, and relies upon Section 2905.34 for definitions of statutory terms, including its statutory definition of obscene material. It is therefore readily apparent that if the definition section is subject to successful constitutional attack, the entire statutory scheme, including the statutory authority for the proceedings below, must fall.

Nor is the substantial nature of the instant challenge to Ohio's "obscenity" laws lessened because of the Ohio legislature's "revision" of such laws subsequent to appellants' trial. (See Sections 2907.32 and 2907.01.) For, although the Ohio laws have been amended subsequent to appellants' trial, and respective provisions renumbered, the context of the law forming the bases of the within appeal remains virtually unchanged.

Section 2905.34 defines as obscene, material to which "when considered as a whole and judged with reference to ordinary adults, any of [four enumerated criteria] apply." (Compare Section 2907.01(F), which sets forth five enumerated criteria.) Listing these criteria, the statute notes that the material is obscene if *"its dominant appeal is to prurient interest," id.* Section (A)(1) (see Section 2907.01(F)(1)), *its dominant tendency is to arouse lust* either by "depicting nudity, sexual excitement or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite," *id.* Section (A)(2) (see Section 2907.01(F)(2)), or by "depicting bestiality or extreme or bizarre violence, cruelty, or brutality", *id.* Section (A)(3) (see Section 2907.01(F)(3)), or where the "cumulative effect" of a series of displays of any of the foregoing is *"a dominant tendency to appeal to prurient interest,* when the appeal to such interest is primarily for its own sake or for commercial exploitation . . .," *id.*, Section (A)(4) (compare Section 2907.01(F)(5)).[2]

The statute defines "nudity" as the representation of "human male or female genitals, pubic area or buttocks" or a female breast "below the top of the nipple" with less than a full opaque covering, or "covered male genitals in a discernibly turgid state." *Id.*, Section (B) (see Section 2907.01(H)). It defines "sexual conduct" as "masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast." *Id.*, Section (D). (Compare Section 2907.01(C) defining sexual activity to mean "sexual conduct" or "sexual contact" or

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2. Section 2907.01(F)(4) sets forth as a fifth alternative criteria, the depiction of "human bodily functions of elimination" if the dominant tendency of the material "is to appeal to scatological interests".

both; and Section 2907.01(B) defining sexual contact to mean "any touching of an erogenous zone of another", including, *inter alia*, "the thigh" and "buttock").

Thus, by its express language, the statute reaches and prohibits, portrayal of the "nudity" of a fully clothed male and the "sexual conduct" of physical contact with the fully clothed female breast or buttock in any publication, picture or film, provided the requisite dominant prurient appeal is shown.

Appellants contend that Section 2905.34 is, on its face, constitutionally infirm for (A) overbreadth and (B) vagueness, in violation of the First and Fourteenth Amendments to the United States Constitution, and that the convictions below based upon the definitions contained in that section are, for that reason, vulnerable to constitutional attack as well.

A. The Statute Is Void for Overbreadth.

Governmental legislative regulation of activity affecting First Amendment rights may not be accomplished "by means which sweep unnecessarily broadly." *N.A.A.C.P. v. Alabama,* 377 U.S. 288, 307 (1964). *Cf. N.A.A.C.P. v. Button,* 371 U.S. 415, 433 (1963); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). Nor need one who attacks legislation for overbreadth demonstrate that his own conduct could not have been regulated by a law drawn with appropriately narrow specificity. *Dombrowski v. Pfister,* 380 U.S. 479, 487 (1965); *United States v. Raines,* 362 U.S. 17, 21-22 (1960); *N.A.A.C.P. v. Button,* 371 U.S. 415, 432-433 (1963); *Gooding v. Wilson,* 405 U.S. 518, 520-522 (1972).

Section 2905.34(A) prohibits *nudity* and/or sexual conduct if its dominant appeal is to prurient interest or its dominant tendency is to arouse lust. However, the

Supreme Court has recently affirmed that publications containing nothing but nudes, whose dominant appeal is unmistakably prurient and lustful, are constitutionally protected. *Jenkins v. Georgia,* ..... U.S. ....., 94 S.Ct. 2750, 2755 (1974). *Cf. Austin v. Kentucky,* 386 U.S. 767 (1967); *Sheperd v. New York,* 388 U.S. 444 (1967).

Moreover, the statutory definition sweeps far more broadly than permitted. Ohio Revised Code Section 2905.34 contains no reference to the constitutional requirement that the material be patently offensive before it may be prohibited. *Jenkins v. Georgia,* ..... U.S. ....., 94 S.Ct. 2750, 2755 (1974). The statute contains an inaccurate reference to the requirement that the material, *taken as a whole,* appeal to a prurient interest, and contains an inaccurate reference to the requirement that the material lack the requisite value (the only reference to a lack of "value" appears in only *one* of the four alternative criteria upon which a conviction may rest, and the reference fails to exclude from the materials defined as obscene, works of serious literary or political value. *Miller v. California,* 413 U.S. 15 (1973).)

Consistent with the admonition in *Miller v. California,* 413 U.S. 15 (1973), that "State statutes designed to regulate obscenity must be carefully limited", the statutes here involved must be struck down as constitutionally infirm for overbreadth.

The Ohio Supreme Court's decision in *State ex rel. Keating v. "Vixen"*, 27 Ohio St. 2d 278 (1971) demonstrates and underscores the constitutional invalidity of Ohio's obscenity laws. For in "*Vixen*" the Ohio Supreme Court construed Ohio's "obscenity" statutes to prohibit the presentation of a motion picture which contains a "series of displays . . . of . . . sexual intercourse . . .

the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is . . . for commercial exploitation . . ." *Id.* at 284-285). Ohio's obscenity laws as construed in *"Vixen"* fail to require that the material be patently offensive; fail to require proof that the materials lack the requisite value; and contain an inaccurate reference to the requirement that the material *taken as a whole,* appeal to a prurient interest. Thus, as so construed, Ohio's obscenity laws suffer more constitutional infirmities than if the statutes alone are reviewed in the absence of the *"Vixen"* decision.

The defendants in *"Vixen"* sought review of their convictions by this Court, and this Court vacated the decision of the Ohio Supreme Court and remanded the matter to the state court for reconsideration in light of this Court's holdings in *Miller v. California,* 413 U.S. 15 (1973) and companion cases. *State ex rel. Keating v. "Vixen"*, 413 U.S. 905 (1973). Upon such reconsideration, the Ohio Supreme Court quoted from its initial *"Vixen"* decision, and then concluded, without stating its reasons, that Ohio's obscenity law, as construed by the Ohio Supreme Court initially in *"Vixen"*, meets with the standards for determining obscenity enunciated in *Miller. State ex rel. Keating v. "Vixen"*, 35 Ohio St. 2d 215, 219 (1973). The state court's conclusion was erroneous.

Quite apart from the constitutional invalidity of Ohio's obscenity law even as construed by the Ohio Supreme Court, appellants deny the validity of the attempt by the Ohio Supreme Court to construe the instant law. For, although a court may supply a definition of obscenity where the statute is silent as to its meaning, a court may not undertake to supplant a definition of obscenity where the statute undertook to define obscenity in very specific

and detailed terms. See, e.g., *Grove Press, Inc. v. Flask*, 326 F. Supp. 574 (N.D. Ohio 1970), *vacated and remanded on other grounds*, 413 U.S. 902 (1973). *Cf. State v. Shreveport News Agency, Inc.*, ... La. ....., 14 Cr.L. 2273, 2274 (S.Ct. La. 12-3-73). Nor does this Court's decision in *Hamling v. United States*, ... U.S. ....., 94 S.Ct. 2887 (1974), compel a contrary result. For, the judicial construction sanctioned in *Hamling* was with reference to an enactment which defined the prohibited conduct in only *generic terms*: "obscene, lewd, lascivious, or filthy [publications]". *Id.* at 2905, 2906.

The ability of the Ohio Supreme Court to construe a definitive statute, and, even assuming such ability, the validity of the determination that as construed the Ohio obscenity law comports with *Miller*, are unsettled questions arising under the Constitution compelling this Court's review.

B. The Statute Is Void for Vagueness.

Quite apart from the broad sweep of the statute, appellants contend that its language is so imprecise, "so vague, the language so loose, as to leave to those who have to apply it too wide discretion", *Kingsley Int'l Pictures Corp. v. Regents*, 360 U.S. 684, 694 (1959). A statute that fails to give fair notice of what conduct is forbidden or that encourages arbitrary and erratic arrests is void for vagueness. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

The instant statute is replete with ambiguities and moral judgments which compound the vice of vagueness. E.g., "tendency to arouse lust", Sections (A)(2) and (A)(3) (see Section 2907.01 (F)(2) and (F)(3)) "in a way which tends to represent human beings as mere objects

of sexual appetite", Section (A)(2) (see Section 2907.01(F)(2)), "extreme or bizarre violence, cruelty or brutality", Sections (A)(3) and (A)(4) (see Section 2907.01(F)(3) and (F)(5)), appeal to prurient interest "for its own sake" for "commercial exploitation" rather than for a "genuine . . . moral . . . purpose", Section (A)(4) (see Section 2907.01(F)(5)).

Acknowledging "the inherent dangers of undertaking to regulate any form of expression", the Supreme Court in *Miller v. California*, 413 U.S. 15 (1973), warned that "state statutes designed to regulate obscene materials must be carefully limited." Works which depict or describe sexual conduct may be prohibited only if that conduct is "*specifically defined*" by the applicable state law, as written or authoritatively construed. (Emphasis supplied.) *Cf. Rabe v. Washington*, 405 U.S. 313 (1972).

II. OHIO REVISED CODE SECTION 2905.38 IS VOID FOR CREATING AN UNREASONABLE PRESUMPTION.

Section 2905.38 provides, *inter alia*, that an owner or manager of a commercial establishment who in the course of his business of selling materials, possesses six or more "identical or substantially similar," *id.* Section (A), obscene articles, and who has "knowledge of their content and character", *id.* Section (A), is presumed to possess them with intent to violate Ohio Revised Code Section 2905.35, which prohibits, *inter alia*, the sale or distribution of obscene materials. (Compare Section 2907.35.)

Determination of the rational connection between the presumed fact and proved fact, necessary to support a criminal statutory presumption, rests upon concluding with substantial assurance that there is a substantial connection

between the two facts, *United States v. Romano*, 382 U.S. 136, 139 (1965), grounded on reason and experience. *Tot v. United States*, 319 U.S. 463, 467 (1943). The presumed fact of intent to distribute, an element of the offense charged in the instant indictment, is not related upon reason and common experience to the fact that the accused had in his possession six "*substantially similar*" articles.

It may hardly be disputed that one interested in a specific area of human life will have six, and many more times that, of similar and related books and articles on the very same subject. Moreover, bare possession is an insufficient predicate for concluding that an accused was dispensing, selling or distributing contraband. *Turner v. United States*, 396 U.S. 398, 423 (1970), *Leary v. United States*, 395 U.S. 6, 46 (1969).

III. THE EVIDENCE WAS ILLEGALLY OBTAINED AND SHOULD HAVE BEEN SUPPRESSED.

The evidence seized and upon which appellants' convictions rest, should have been suppressed on any or all of the following grounds:

(A) The search and seizures were grounded upon a warrant issued pursuant to an affidavit which set forth allegations substantially similar to those presented in the affidavit reviewed and found constitutionally infirm by this Court in *Spinelli v. United States*, 393 U.S. 410 (1969). In the instant case, as in *Spinelli*, sufficient underlying facts and circumstances to support the informant's accusations or the affiant's belief in his informer's reliability or credibility are absent; and as in *Spinelli*, absent the informant's tip, probable cause was not present to support issuance of the search warrant.

(B) The instant case presents for this Court's review the validity of a search warrant containing language of such indiscriminate sweep and so beyond the pale of constitutional tolerance as has not been before this Court since its decision in *Stanford v. Texas*, 379 U.S. 476 (1965). The instant materials were seized pursuant to a warrant authorizing the search for and seizure of "obscene and pornographic" materials. Not one publication is specifically named in the search warrant. Describing the materials as "obscene" is no description at all. *Marcus v. Search Warrants*, 367 U.S. 717, 732 (1961). Thus, the alleged search warrant failed to describe the items to be seized in violation of the First and Fourteenth Amendments. *Stanford v. Texas, supra*; *Marcus v. Search Warrants, supra.*

(C) The instant search warrant was issued without a prior judicial determination of the obscenity of any of the seized materials. The judge who issued the warrant neither personally scrutinized, nor passed upon a description of, the over 1,400 items actually seized. A search warrant for the seizure of allegedly obscene material may not issue "on the mere conclusory allegations of an officer." *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 2802 (1973). *Cf. Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).

(D) The police conducted a *mass* seizure of over one thousand (1,000) publications in the absence of a constitutionally compelled prior adversary hearing requiring suppression of the materials as evidence. *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 2794 (1973); *Quantity of Books v. Kansas*, 378 U.S. 205 (1964); *Marcus v. Search Warrants*, 367 U.S. 717 (1961).

(E) Without direction or instruction, the police officers rummaged through publications and in their unfet-

tered discretion determined the over 1,400 materials that would be seized. Such conduct amounted to a general search and seizure violative of due process. See *Marcus v. Search Warrants*, 367 U.S. 717, 723, 732-33 (1961); *Stanford v. Texas*, 379 U.S. 476, 482-483, 485 (1965); *Kremen v. United States*, 353 U.S. 346.

IV. APPELLANTS WERE UNLAWFULLY CONVICTED WITHOUT PROOF OF GUILTY KNOWLEDGE AND GUILTY PURPOSE.

Some degree of guilty knowledge and guilty purpose are essential to a valid prosecution for distribution of obscenity. *Smith v. California*, 361 U.S. 147 (1959).

Yet the record of the state court proceedings is silent as to any proof whatever that either of the appellants had any knowledge, actual or constructive, of the character and content of the materials for which they were convicted or had any illegal intent as to the use of such materials. Review of the evidence reveals that the only relevant government proofs were the introduction into evidence of the material itself and the fact that such material was removed from Queen City's warehouse.

The record discloses that the prosecution failed to prove the elements required by Ohio Revised Code Section 2905.38 to invoke the presumption of an illegal intent (even assuming, which appellants deny, see *ante*, the validity of such statute).

Section 2905.38 provides, *inter alia*, that an owner or manager of a commercial establishment who in the course of his business of selling materials, possesses six or more "identical or substantially similar," *id.* Section (A), obscene articles, and who has "knowledge of their

content and character", *id.* Section (A), is presumed to possess them with intent to violate Ohio Revised Code Section 2905.35, which prohibits, *inter alia*, the sale or distribution of obscene materials. (Compare Section 2907.35.)

First, the prosecution failed to introduce any evidence that either of the defendants possessed six or more identical, or substantially similar articles. As to defendant Marshall it is clear that his presence alone was insufficient evidence to establish possession. *United States v. Romano*, 382 U.S. 136, 140-141 (1965). *Second*, the prosecution failed to introduce any evidence establishing that either of the defendants had knowledge of the contents or the character of the materials laid in the indictment.

V. THE MATERIALS ARE CONSTITUTIONALLY PROTECTED EXPRESSION.

In *State ex rel. Keating v. "Vixen"*, 27 Ohio St. 2d 278 (1971), *reversed and remanded* 413 U.S. 905 (1973), *on remand* 35 Ohio St. 2d 215 (1973), the Ohio Supreme Court has approved the exhibition of an otherwise "obscene" film if portions depicting actual or purported acts of sexual intercourse are deleted. Such disregard of the mandate to view material "as a whole" in determining its dominant theme, *Miller v. California*, 413 U.S. 15 (1973) is indicative of the constitutionally infirm standards employed by the Ohio courts in determining the obscenity *vel non* of the material.

Material whose subject matter is sex and which contains scenes of nudity is not obscene for those reasons alone. *Jenkins v. Georgia*, ... U.S. ....., 94 S.Ct. 2750, 2755 (1974); *Roth v. United States*, 354 U.S. 476, 487 (1957). Absent from several of the 41 separate materials laid in

the indictment, e.g. rubber goods, is any portrayal or description of specific conduct constituting "hard core" pornography. The remaining materials did not affront community standards, and taken as a whole, did not appeal to a prurient interest in sex. Thus, the materials are constitutionally protected expression, *Miller v. California, supra*, and this Court's independent review of the materials is compelled. *Jenkins v. Georgia,* ..... U.S. ....., 94 S.Ct. 2750 (1974).

VI. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY IN DEFINING THE ELEMENTS OF THE CRIME.

The trial court in charging the jury, identified the "average person in the community" to include "the community as a whole, *young* and old . . . men, women and children." Such instruction violated the First Amendment. *Butler v. Michigan,* 352 U.S. 380 (1957); *Miller v. California,* 413 U.S. 15 (1973); *Roth v. United States,* 354 U.S. 476, 489 (1957).

VII. THE TRIAL COURT ERRONEOUSLY LIMITED DEFENSE COUNSELS' VOIR DIRE EXAMINATION OF THE JURY.

The right of defense counsel to conduct the *voir dire* examination of the jury is not merely a privilege, but an obligation. It is not sufficient for the court to merely ask a prospective juror whether, whatever opinions he may have for or against the subject matter or party in the instant case, the juror could still be able to render a verdict according to the law and instructions as given by the court. *Irvin v. Dowd,* 366 U.S. 717, 723-724 (1961).

In the instant case upon the empaneling of the jury, defense counsel, justifiably and in good faith, attempted to probe the hidden prejudices and biases of the prospective jurors. But the trial court erroneously refused to permit defense counsel to pursue the critically relevant *voir dire* examination of the jury panel. Nor does this Court's decision in *Hamling v. United States*, ... U.S. ....., 94 S.Ct. 2887 (1974) compel a contrary result. For in *Hamling*, the trial court asked many questions similar to those submitted by counsel, and conducted a "clearly sufficient" examination. *Id.* at 2918. However, in the instant case the trial court's "inquiries" fell far short of constituting a sufficient examination and were substantially limited to asking the prospective jurors whether they could render a verdict based upon the law and notwithstanding any personal attitudes or prejudices that they may possess.

CONCLUSION

This Court has exercised and continues to exercise its jurisdiction in cases involving state laws affecting First Amendment rights. *Jenkins v. Georgia*, ... U.S. ....., 94 S.Ct. 2750 (1974) (probable jurisdiction noted at 94 S.Ct. 718); *Miller v. California*, 413 U.S. 15 (1973); *see also Roth v. United States*, 77 S.Ct. 854 (1957) (review on writ of *certiorari*). Thus, the Court has always regarded such cases as presenting substantial constitutional questions.

The constitutional validity of the Ohio obscenity law, Sections 2905.34 and 2905.35, is currently before this Court on a petition for writ of *certiorari*, *State ex rel. Sensenbrenner v. Adult Book Store*, 35 Ohio St. 2d 220 (1973),

petition for cert. filed, 43 U.S.L.Week 3037, 3049 (U.S. Dec. 24, 1973) (No. 73-982).

In the instant appeal, appellants contend, *inter alia,* that the relevant Ohio statute is on its face, and as applied, constitutionally infirm in violation of the First and Fourteenth Amendments. Appellants further contend that the Ohio statute relied upon in the state trial proceedings to prove *scienter,* is void for allowing an element of the crime charged to be unreasonably presumed rather than proved.

Not only do appellants challenge the validity of the determination of the Ohio Supreme Court that the Ohio obscenity law as construed comports with *Miller,* but appellants further challenge the ability of the Ohio Supreme Court to attempt a judicial rewriting of a definitive statute. The decisions of the highest courts of several states are in conflict as to whether state statutes can be judicially rescued by a substantial rewriting as undertaken by the Ohio Supreme Court. *State ex rel. Keating v. "Vixen",* 35 Ohio St. 2d 215 (1973). *Cf.,* e.g., *State v. Shreveport News Agency, Inc.,* ..... La. ....., 287 So. 2d 464, 14 Cr.L. 2273 (1973) (statute struck down); *Stroud v. State,* ..... Ind. ....., 300 N.E.2d 100, 13 Cr.L. 2541 (1973) (statute struck down); *Commonwealth v. Horton,* ..... Mass. ....., 15 Cr.L. 2184 (4-23-74) (statute struck down); *Rhodes v. State,* ..... Fla. ....., 283 So. 2d 351, 14 Cr.L. 2081 (1973) (statute upheld); *Gibbs v. State,* ..... Ark. ....., 14 Cr.L. 2450 (2-4-74) (statute upheld); *Art Theater Guild, Inc. v. State,* ..... Tenn. ....., 14 Cr.L. 2498 (2-19-74) (statute struck down); *State v. Welke,* ..... Minn. ....., 14 Cr.L. 2498 (3-1-74) (statute upheld); *Chobot v. Circuit Court,* ..... Wis. ....., 14 Cr.L. 2323 (12-10-73) (statute upheld); *State v. J-R Distributors, Inc.,* 14 Cr.L. 2006 (7-27-73) (statute upheld).

Appellants also urge that the instant state court decisions are violative of well-established constitutional principles in the areas of the law of search and seizure; proof of *scienter* as an element of the crime charged; determinations of obscenity *vel non* of specific materials; jury instructions in obscenity cases; and the rules of *voir dire* of a jury panel.

The issues involved and herein presented are substantial and require plenary consideration for their resolution.

Respectfully submitted,

BERNARD A. BERKMAN
HAROLD L. LEVEY
Counsel for Appellants

APPENDIX A

Orders of the Supreme Court of Ohio

No. 74-220

THE SUPREME COURT OF OHIO
The State of Ohio, City of Columbus

STATE OF OHIO,
Appellee,

vs.

QUEEN CITY NEWS, INC., *et al.*,
Appellants.

ORDER ON APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY

(May 10, 1974)

This cause, here on appeal as of right from the Court of Appeals for Hamilton County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

(Duly certified)

ORDER OF THE SUPREME COURT OF OHIO ON MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR HAMILTON COUNTY (May 10, 1974)

(Title as above)

It is ordered by the Court that this motion is overruled.

ORDER OF THE SUPREME COURT OF OHIO ON REHEARING (June 6, 1974)

(Title as above)

It is ordered by the court that rehearing in this case is denied.

ORDER OF SUPREME COURT OF OHIO ON MOTION FOR STAY OF EXECUTION

(June 20, 1974)

(Title as above)

Upon consideration of the motion, filed by counsel for Appellant, to stay execution pending the timely filing of an appeal to The Supreme Court of the United States, it is therefore

ORDERED that this motion be sustained and execution of judgment is hereby stayed for a period of twenty (20) days from this date to enable counsel for Appellant to apply to The Supreme Court of the United States for an indefinite stay.

/s/ C. WILLIAM O'NIEL
Chief Justice

APPENDIX B

Opinion of the Court of Appeals for Hamilton County, Ohio

(Dated January 14, 1974)

No. C-72345

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

QUEEN CITY NEWS, INC.

and

JOHN MARSHALL,
Defendants-Appellants.

DECISION.

Per Curiam.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

Appellant, Queen City News, Inc., presents by way of brief and supplement thereto, thirteen assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of appellant, Queen City News, Inc., and a jointly tried co-

defendant, John Marshall, under Section 2905.35, Ohio Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material.

Appellant, John Marshall, presents by way of brief and supplement thereto, sixteen assignments of error.

These assignments of error will be considered below first in the order raised by appellant, Queen City News, Inc., and second in the order raised by appellant, John Marshall.

We note that this Court this day has decided State of Ohio v. Michael Kensinger, case number C-73008, unreported, wherein many of the issues raised are similar to those broached by the assignments of error in the instant case. Additionally, we note that counsel for Michael Kensinger, defendant-appellant, in case number C-73008, is the same counsel representing appellant, John Marshall, herein, and that counsel for appellant, Queen City News, Inc. is his associate.

Therefore, in disposing of some of the assignments of error asserted by the appellants in this case, reference will be made to our rulings in Kensinger, infra, where the reasons therefor apply to the assignments here before us.

Assignments of Error, Queen City News, Inc.:

I.

Queen City asserts that the statute upon which the indictment was based violates the First and Fourteenth Amendments to the United States Constitution.

This assignment is not well taken for the reasons set forth in our rulings upon the third and fourth assignments of error in Kensinger, supra.

II.

This assignment overlaps the first in that the contention is that the indictment failed to charge an offense punishable within the permissible limits of the First and Fourteenth Amendments to the United States Constitution. We find it not to be well taken for the reasons set forth in the disposition of the fourth assignment of error in *Kensinger*, supra.

III.

Appellant alleges that the trial court erred in overruling the pretrial motion to suppress evidence obtained in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

It is argued first in support of this assignment that special First Amendment principles apply which require a prior adversary hearing before seizure.

Despite the fact that some 1400 separate items, including books, magazines, film, phonograph records and rubber goods were seized and removed from a warehouse, there is nothing to show that more than one copy of a book, magazine or other item was taken by the police officers conducting the search. There is testimony that the warehouse contained from 100,000 to 200,000 items, there being numerous copies of each publication and duplications of the rubber goods. It is undisputed that the business of appellant was not shut down nor interrupted for more than several hours.

In deciding *State v. Albini* (1972), 31 Ohio St. 2d 27, the court remarked at page 30 of the opinion:

> ". . . , we do not read the above cited Supreme Court decisions as demanding that in every case where a seizure of alleged obscene material is to be made,

a preseizure adversary hearing is constitutionally required. Whether or not such a hearing is necessary must depend upon the nature and purpose of the seizure."

Just as in *Albini*, supra, the seizures now before us were not made for the purpose of preventing the dissemination of that which the various books, magazines, films and phonograph records contained nor preventing the sale of the rubber goods. Rather, the single samples were taken for the purpose of preserving them in order that they might be used as evidence in proceedings to determine whether their exhibitors were guilty of committing a crime.

Subsequent to the decision in *Albini*, the Supreme Court of the United States decided *Heller v. New York*, 93 S.Ct. 2789 (1973), the first headnote of which is:

"There is no absolute First or Fourteenth Amendment right to a prior adversary hearing where allegedly obscene material is seized pursuant to warrant to preserve material as evidence in a criminal prosecution."

This squares with the syllabus in *Albini*:

"Where, incident to a lawful arrest upon a charge of exhibiting an obscene motion picture film, a single copy of the film is seized as evidence to be used in support of the charge, the fact that, prior to its seizure, no adversary hearing had been held upon the question of the obscenity of the film does not require reversal of a conviction for its unlawful exhibition."

Consequently, as we noted in our ruling on the first assignment of error in Kensinger, the reasons impelling a prior adversary hearing in cases involving the seizure

of presumptively constitutionally protected materials for destruction or other such purpose, as summarized in *Heller*, supra, *Roaden v. Kentucky*, 93 S.Ct. 2796, are simply not present in this case.

Appellant argues, further, that probable cause did not exist for the issuance of the search warrant; that the informant's reliability was not supported; that the facts failed to establish that a crime was being committed at the time the warrant issued; that the warrant failed to meet Fourth Amendment specificity requirements and failed to satisfy First and Fourth Amendment particularity requirements, and that the search conducted by the executing officers was a general search.

Fundamentally, it is required that the officer authorizing the search of premises be neutral and detached and that the information given him by an affiant be sufficient to enable him to make an independent judgment that probable cause exists to issue the warrant. *State v. Haynes* (1971), 25 Ohio St. 2d 264.

The standard of reasonableness for obtaining a search warrant has been set forth in *Aguilar v. Texas*, 378 U.S. 108, and *Spinelli v. United States*, 393 U.S. 410. Where the search warrant is issued pursuant to an informer's tip, the affidavit must: (i) set forth such of the underlying circumstances as may be necessary to enable the magistrate to judge the probable validity of the informant's conclusions; and (ii) some indication of the trustworthiness of the informant.

Here, the informant was a former employee of Queen City News, Inc. who knew what materials were stored in the warehouse and who had delivered such as a route man serving customers. We believe that the "two pronged" test was met and that the affidavit is sufficiently

detailed as to meet the requirements of law. Our examination of the record leads us to conclude that the tipster's information was not stale. The affiant had observed appellant conducting business, had received information about the character of that business and had verified by personal observation that at least one visible item was a publication which, in his opinion, was obscene. Such facts, coupled with the background afforded by the informant, clearly negate appellant's protests that there was nothing before the magistrate to establish probable cause that any crime was being committed.

It is equally apparent that where, as here, only single samples of a large inventory of many types of publications and other goods are seized to be used as evidence in a proceeding to follow and where, as here, such items have been identified with sufficient specificity and particularity in the warrant to search, such search is lawful and is not a general search.

Accordingly, we find the third assignment of error not to be well taken.

IV.

In this assignment, appellant asserts that the materials upon which the indictment was based were "protected expression under the First and Fourteenth Amendments to the United States Constitution" and that the prosecution totally failed to meet its burden of proof of obscenity.

It can no longer be gainsaid that obscene material is not speech entitled to First Amendment protection. *Paris Adult Theater I v. Slaton,* 93 S.Ct. 2628; *Miller v. California,* 93 S.Ct. 2607; *United States v. Roth,* 354 U.S. 476.

In deciding *Slaton*, the court pointed out at pages six and seven of the opinion:

> "Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

Then, the record before us when viewed in the light of what we understand the law to be, clearly demonstrates that this assignment of error is without merit. See, also, the rulings upon the second and fifth assignments of error in Kensinger, supra.

V.

This assignment is that the trial court erred in overruling the motion for acquittal upon the ground that the prosecution had failed to prove all of the essential elements of the offense charged.

The thrust of the argument advanced by appellant echoes that given in support of the fourth assignment.

We have examined the record, including the publications and materials in question, and are compelled to conclude that there is therein substantial credible evidence of probative value as to each element of the offense charged. Therefore, and for the reasons given above in our ruling on the fourth assignment, the fifth assignment is not well taken.

VI.

The sixth assignment reasserts the contention that the materials received into evidence are constitutionally protected. It is without merit for the reasons given in rulings upon the fourth assignment herein, and in our rulings upon the fifth and sixth assignments of error in Kensinger.

VII.

This assignment is that the trial court erred in overruling appellant's objections to admission into evidence of subpoenaed documents. It is urged that the subpoena *duces tecum* of corporate records consisting of personnel and payroll records and delivery sheets was (a) illegally issued; (b) invalidly served, and (c) that the records were erroneously received into evidence.

The State first attempted to serve an alleged statutory agent, but the agency was denied by the purported agent. Then, the State dropped a subpoena through the mail slot of the warehouse premises. Lastly, the State served an employee of the corporation on the loading dock of the warehouse.

Upon instruction of the court after conference with counsel, counsel for Queen City brought the records into court, but protested their production.

Although a number of cases are cited in support of branch (a) of the argument, with none of which do we disagree, we are not persuaded that corporation records cannot be subpoenaed in a criminal case. It must be remembered that the records were not seized but were sought to be produced by valid process.

Secondly, service upon the employee, under all the circumstances disclosed by the record, was sufficient.

The contention that the documents were erroneously received raises the essential question of protection afforded the corporate and individual defendants in the case by the Fifth Amendment to the Constitution of the United Stazes.

In *Wilson v. United States,* 221 U.S. 361, it was observed:

> ". . . [the corporation] cannot resist production [of books and papers] upon the grounds of self-crimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment . . ., it must submit its books and papers to duly constituted authority when demand is suitably made."

The Ohio Supreme Court adopted this view and quoted extensively from *Wilson,* supra, in deciding *In re Bott,* 146 Ohio St. 511. At page 518 of the unanimous opinion in that case, we find:

> ". . . an officer of a corporation cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it."

This concept has been refreshed in *State v. Pussycat Cinex* (1973), 36 Ohio St. 2d 108, which cites *Wilson,* supra.

The privilege against self-crimination is then, not available to a corporation. Therefore, the seventh assignment of error is not well taken. Parenthetically, we note that this question as it pertains to the individual defendant-appellant will be discussed below.

VIII.

This assignment relates to the charge to the jury, the contention being that it violated the First and Fourteenth

Amendments to the United States Constitution. Essentially, the arguments in support of this assignment parallel those advanced with reference to the seventh assignment of error in Kensinger. We find this assignment not to be well taken for the reasons given in our rulings upon the third and seventh assignments of error in Kensinger. Here, as in Kensinger, the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio Revised Code, and otherwise in its general duties and prerogatives.

IX.

Here, appellant claims that the court erred in limiting voire dire examination of the jury by defense counsel.

It is argued that rights accruing under the Fourteenth Amendment were denied because the court limited efforts of counsel to "probe the attitudes of prospective jurors" regarding, inter alia, "contemporary community standards of depiction of sexual material", "shifting views of frankness" and morality in depiction of sexual subject matter, "depth of feelings regarding obscenity of depiction", and attitudes about determining the dominant theme and redeeming social value of "sexually oriented" publications.

Examination of the jury upon voire dire begins at page 196 of the transcript of the proceedings and concludes at page 610. The initial impression we received upon our examination of this part of the record is that the judge presiding exhibited patience, restraint and stamina. He permitted wide latitude to both defendants before the bar in their searching examination of prospective jurors. We find nothing to sustain their claim that the court abused its discretion or that strictures placed upon interrogation of

the panel in ruling upon objections by the State prejudiced the accused.

The ninth assignment is not supported by the record and is not well taken.

X.

The tenth assignment is that the trial court erroneously denied defense counsel inspection of grand jury minutes.

The Supreme Court of Ohio recited the general rule to be applied when inspection of grand jury minutes is sought in its decision in *State v. Laskey*, 21 Ohio St. 2d 187, at page 191 of the per curiam opinion:

> "Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general."

The court referred in *Laskey* to the rule in *State v. White* (1968), 15 Ohio St. 2d 146, declaring that:

> "The *White* rule contemplates a limited investigation for the purpose of determining whether inconsistencies exist between a witness' prior statements and his testimony at trial. Such investigation can be made only after the witness testified at trial, and, generally, cannot be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination."

See, also, *State v. Patterson* (1971), 28 Ohio St. 2d 181, especially syllabus three.

In this case, appellant sought inspection of the minutes to "test the foundation upon which the indictment was

grounded", arguing that "there is no unequivocal evidence in the record indicating that the grand jury returned the . . . indictment . . . upon a review of the 41 respective items supportive of the counts therein contained".

We do not discern from the record that the appellant has demonstrated the particularized needs required by the rule in *White* and *Laskey* and, consequently, are constrained to conclude that the assignment of error is not well taken.

Supplemental Assignments of Error:

XI.

Queen City urges herein that the affirmance of the conviction would violate due process and ex post facto prohibitions.

This assignment reflects the issues broached in the third and tenth assignments of error in Kensinger and is found not to be well taken for the reasons given therein.

XII.

Here, appellant claims again that the statutes under which it was charged are void for overbreadth or vagueness. It is not well taken for the reasons set forth in our ruling upon the first assignment of error herein and in the third and fourth assignments in Kensinger.

XIII.

The thirteenth assignment restates the issues raised by the third and fourth assignments of error herein and is not well taken for the reasons given therein.

Therefore, the judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, Queen City News, Inc. is affirmed.

Assignments of Error, John Marshall:

I.

In his first assignment of error, appellant, John Marshall, asserts that the search and seizure at the warehouse of Queen City News, Inc. was an unreasonable search and seizure.

While this assignment is prolix, we find that it raises the same, or very similar, issues brought before us in the third assignment of error in the appeal of Queen City News, Inc. Hence, we find this assignment of error by appellant, John Marshall, not to be well taken for the reasons given in our ruling hereinbefore on the third assignment of error of Queen City.

II.

This assignment is that the court erred in admitting publications into evidence where no evidence was presented establishing obscenity of the items.

The same question has been considered and ruled upon in Queen City's appeal with respect to the fourth and sixth assignments therein and in the appeal of Michael Kensinger with respect to the second and fifth assignments of error in that case.

Accordingly, this assignment is found to be without merit for the same reasons.

III.

The appellant asserts, here, that Sections 2905.34 and 2905.35, Ohio Revised Code, are unconstitutional and repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

The same issue was raised by Queen City and Kensinger and this assignment by Marshall is held to be without merit for the reasons given in our rulings on the first assignment of Queen City and the third and fourth assignments of error by Kensinger.

IV.

Here, appellant questions whether the proof by the State demonstrated that the publications were not protected against State regulation by the First and Fourteenth Amendments.

We have ruled on the same proposition in the first and second assignments of error by Queen City herein and in the third and fourth assignments in Kensinger. Therefore, the assignment of error by Marshall is not well taken for the same reasons.

V.

This assignment alleges that the prosecution failed to establish a prima facie case. It is not well taken for the reasons given above on the fourth and sixth assignments of Queen City and the second and fifth assignments in Kensinger.

VI.

Here, appellant urges that the court erred in not dismissing the cause at the conclusion of defendant's case, where the State offered no rebuttal evidence.

It is not well taken for the reasons given by us in disposing of the fifth and six.h assignments in Kensinger and the fourth and sixth assignments of Queen City herein.

VII.

The seventh assignment of error is identical in its essential thrust to the seventh assignment of error by Queen City as it relates to the admission of the corporate records of Queen City News, Inc.

A similar assignment numbered seven has been made by Queen City and ruled upon above as it pertains to that appellant, and to the degree that our rulings therein apply to Marshall, individually, they are adopted here.

When the entire transcript of the proceedings is considered, it is clear that it was never disputed that appellant, John Marshall, was connected with the operation of the business of Queen City News, Inc. He was at the warehouse when the warrant to search was executed and the seizure effected and had been there the day before. The essence of the defense was not that the accused did not possess the materials but they were not obscene and therefore protected.

We view the admission of the corporate records as being cumulative, at most, and are able to discern no ground upon which to determine that the appellant, Marshall, was prejudiced thereby, either by the records having been received in evidence or by the possibly contradictory remarks of the court to counsel. Hence, the assignment of error is without merit.

VIII.

This assignment challenges the instruction to the jury on the "national contempory community standard", and appellant contends, inter alia, that the jury was misdirected on the issues of "dominant theme-prurient appeal" and "redeeming social value".

We find the eighth assignment of error not to be well taken for the reason that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases. For an expansion of this fundamental reason, attention is directed to our rulings in the seventh and third assignments in Kensinger and the eighth assignment in the appeal of Queen City.

IX.

This assignment asserts that the record establishes the bias of the trial court which denied defendant's right to effective counsel and to a fair and impartial trial.

We find the assignment not to be well taken because the record, considered in its totality, fails to support the assigned error in any of its particulars.

X.

The tenth assignment by Marshall is the same in its thrust and import as the tenth assignment by Queen City based upon denial of access to grand jury minutes and is without merit for the reasons given in our ruling in Queen City's appeal.

XI.

This assignment asserts that the court prejudiced Marshall in restricting inquiry to the venire. It is without merit for the reasons given in our rulings upon the ninth assignment in the appeal by Queen City.

XII.

Here, appellant contends that the court violated his rights granted by the Fifth and Fourteenth Amendments to the Constitution of the United States by "commenting

on the failure of the defendant to testify in his own behalf" during its instruction to the jury.

The court stated to the jury:

> "It is not necessary that a defendant take the witness stand in his or its own defense. He has a constitutional right not to testify. The fact that the defendant or defendants did not testify must not be considered for any purpose nor should any inference be drawn therefrom."

We believe the better practice to be for the court not to so instruct, but when the charge as a whole is considered the inclusion of the quoted language does not constitute prejudicial error.

Therefore, the assignment is not well taken.

XIII.

This assignment is, essentially, that Marshall was denied constitutional rights because the publications were not read to the jury and that since the jury "deliberated for a total of four hours and forty-six minutes" it follows necessarily that the jury could not have read and considered the materials submitted as evidence.

There is nothing in the record from which we could conclude that the jury was guilty of misconduct without indulging in improper speculation. There is nothing to demonstrate how the jury reached the verdict and it must be presumed that the result was reached in harmony with the instructions of the court and according to law. The general rule to be applied i hat no judgments of conviction will be reversed unless it appears affirmatively from the record that the accused was prejudiced. We find no such affirmative demonstration and must conclude that the assignment is not well taken.

XIV.

The ground of this assignment of error has been disposed of in our ruling on the eighth assignment of error in Kensinger and the reasons there given are adopted here.

XV.

Here, Marshall asserts that the verdict is manifestly against the weight of the evidence and contrary to law.

We have examined the record, including the publications and materials in question, and have concluded that there is present in the record substantial evidence of probative value as to each element of the crime charged. Accordingly, the assignment is not well taken.

XVI. (Supplemental)

This assignment of error is that the constitutional test (*Memoirs*) has been "completely and totally repudiated" in *Miller v. California*, 93 S.Ct. 2607. It is not well taken for the reasons given in the disposition of the third and tenth assignments in Kensinger and adopted in the eleventh assignment in the appeal of Queen City.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, John Marshall, is affirmed.

HESS, P. J., SHANNON and PALMER, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B (Cont'd)

Opinion of Court of Appeals in Companion Case

(Dated January 14, 1974)

No. C-73008

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

vs.

MICHAEL KENSINGER,
Defendant-Appellant.

DECISION.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of proceedings, the assignments of error, briefs and arguments of counsel.

Appellant presents by way of brief and supplement thereto, ten assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of defendant-appellant under Section 2905.35, Ohio Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material. These assignments of error will be considered below in the order raised by appellant.

I.

Appellant asserts a denial of rights under the First and Fourteenth Amendments of the Constitution of the United States, an unlawful arrest, and an unconstitutional prior restraint on protected materials, where there was no antecedent "judicially supervised adversary hearing" before the arrest and trial of appellant on the issue of the claimed obscenity of certain publications.

The publications in question, "Obscene! A New Definition For The New-Generation" and "Perversions" were purchased by an officer of the Cincinnati Police department, in plain clothes in an adult bookstore on Seventh Street in downtown Cincinnati. The two publications were offered for sale to the officer by appellant, who was working behind the raised stand or counter inside the store, and who, after some conversation with the officer while the latter perused the publications on the rack, stated to the officer: "If you are looking for something good, look at these", handing him the two publications in question and breaking the plastic seal on them as he did so. The officer, after looking at the publications, tendered the purchase price to appellant, who accepted it. The officer then took his purchases out of the bookstore and, in due course, to the grand jury, which thereupon returned its indictment against "John Doe", subsequently identified as appellant.

This Court has had occasion previously to examine and to reject, under circumstances resembling the foregoing, the asserted necessity for an antecedent adversary hearing. *State v. Cornett,* 32 Ohio App. 2d 211. We find nothing in the law since the release of that opinion to require us to change our conclusion expressed there, that no constitutional, statutory, or other inhibition or

prohibition exists to frustrate or taint the procedure followed in this case. It may be noted that, like *Cornett*, supra, and unlike *Heller v. New York*, 93 S.Ct. 2789, *Roaden v. Kentucky*, 93 S.Ct. 2796, and other authorities cited by appellant, no Fourth Amendment involvement in search and seizure arises in this case. The material was offered to an officer lawfully on the premises as a business invitee, was accordingly purchased by him and thereafter removed by him with the consent of the owner's agent. Nothing was "seized" in a sense requiring a search warrant, or an adversary judicial determination to protect fragile First and Fourteenth Amendment rights. The reasons impelling a prior adversary hearing in cases involving the seizure for destruction or other such purpose of presumptively constitutionally protected materials, as summarized in the *Heller* and *Roaden* cases, are simply not, in our view, present here. Accordingly, appellant's first assignment of error is overruled.

II.

Appellant's second assignment of error asserts error in the admission of the two publications into evidence without contemporaneous testimony and evidence bearing on the issue of the obscenity of the publications. Thus, argues appellant, the State may not rely solely upon the publications themselves to demonstrate their own obscenity, but must accompany such exhibits with independent testimony relating such publications to the specific obscenity tests or standards then applicable.

We do not so understand the law. As stated in the majority opinion in *Paris Adult Theater I v. Slaton*, 93 S.Ct. 2628:

> "Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene

> when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the questions."

Appellant's second assignment of error is without merit.

III.

Next, appellant asserts that the statutes under which appellant was indicted, tried and convicted, Revised Code Sections 2905.34 and 2905.35, construed in pari materia, are facially unconstitutional and have been applied in an unconstitutional manner, in contravention of the First and Fourteenth Amendments. However, in *State, ex rel. Keating v. Film Entitled "Vixen"*, 27 Ohio St. 2d 278, the Supreme Court of Ohio considered the issue of these two enactments against the requirements of the First Amendment of the U. S. Constitution and the Ohio Constitution and found no conflict therein either "facially", nor as they were involved in that case, in a nuisance abatement action under Revised Code Section 3767.01 et seq. The court stated:

> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse." (p. 283)
>
> * * * * *
>
> "Those two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that . . . So stated, they proscribe conduct which 'bears no necessary relationship to the

freedom to speak, write, print, or distribute information or opinion.' *Schneider v. State* (1939), 308 U.S. 147, 161."

In the body of the *Vixen* decision, the court cited both *Roth v. United States*, 354 U.S. 476, and *Memoirs v. Massachusetts*, 383 U.S. 413 which, as pointed out in the dissent of Judge Corrigan, supplied the definition of obscenity required by the Supreme Court of the United States to be applied in the trial of that, as in this, case. We can find no reason or authority to require us to find Revised Code Sections 2905.34 and 2905.35 facially unconstitutional. *State v. Mazes*, 7 Ohio St. 2d 136; *State v. Blair*, 32 Ohio St. 2d 237.

Nor do we find them unconstitutionally applied under the record of this case; certainly not, as appellant argues, because they "impose a standard equally applicable to juveniles and adults alike, thereby reducing the adult standard to that of a juvenile standard", since, from the statutory scheme, it may as readily be argued that the juvenile standard is *raised* to that of the adult standard. In any event, the State has been held to have a legitimate concern in both areas, and we find no reason why such concern may not be expressed in the fashion adopted by the legislature here. *Paris Adult Theater I v. Slaton*, 93 S.Ct. 2628 (slip opinion at pp. 7-8).

As to appellant's argument, raised in his Supplementary Brief, that the recent decision by the Supreme Court of the United States in *Miller v. California*, 93 S.Ct. 2607, so repudiated the former *Roth-Memoirs* obscenity test as "unworkable" and as casting a burden on the State "virtually impossible to discharge", that any conviction secured thereunder is necessarily infirm, we must disagree. We have been cited to no authority and have discovered none

which would prohibit a State from enacting or requiring a more *stringent* or difficult-to-prove test for obscenity than that currently deemed permissible under the First and Fourteenth Amendments. If *Miller* has now eased two of the *Memoirs* tests so that the State is no longer required to establish that the materials are "utterly without redeeming social value", but may instead show that the material "taken as a whole, does not have serious literary, artistic, political, or scientific value", and if the State is no longer required to offer evidence of nor the trial court to charge on "national standards", but where obscenity may be determined by applying "contemporary community standards" instead, we are aware of no prejudice to a defendant found guilty by a jury, under competent and probative evidence to sustain it, pursuant to a charge by the trial court requiring it to find the materials to be *utterly* without redeeming social value viewed in the context of national standards. Not, in any event, unless we are required to find that *Miller* declared the old test to be *absolutely* impossible to apply and, therefore, all convictions secured thereunder to be suspect and perhaps voidable. We find nothing in *Miller* to require this drastic view.

We may note, in passing, the remand of the above *Vixen* decision which was decided under the *Roth-Memoirs* rule, by the Supreme Court of the United States to the Supreme Court of Ohio, for consideration in the light of *Miller,* and the reaffirmance thereof by the latter, stating:

> "This court is of the opinion that the statutes applied in this cause initially by the court comport with the standards enunciated in *Miller.*"

State ex rel. Keating v. "Vixen", 35 Ohio St. 2d 215. We find, therefore, as did apparently the Supreme Court of Ohio, no fatal conflict in a conviction secured under criminal statutes limited and applied to conform to the *Roth-Memoirs* test, where such statutes are also held subsequently to comport with the broader *Miller* test.

As to appellant's argument that the *Miller* test may not be retroactively applied to sustain the instant judgment, we defer discussion to our disposition of appellant's tenth assignment of error.

Appellant's third assignment of error is not well taken and is accordingly overruled.

IV.

In his fourth assignment of error, appellant argues that the absence from the record of any evidence on behalf of the State of "pandering", of distribution of materials to juveniles, and/or evidence or proof of any mode of distribution of materials in a manner that an unwilling adult could not avoid exposure, resulted in a failure to remove the materials from the protection of the First and Fourteenth Amendments, requiring favorable action by the trial court on various motions to strike and to dismiss appellant. This argument appears to derive from *Redrup v. New York*, 386 U.S. 773, when the court reversed several obscenity convictions from various states, pointing out in its terse opinion that none of the cases considered involved areas of control which the Supreme Court had previously held to be legitimate areas of state concern, for example, a specific and limited statutory concern for juveniles, assaults upon an individual's right of privacy by obtrusive display of offensive materials, and "pandering" in the *Ginzburg* sense. We do not read *Redrup*, however, as any indication of intent to *limit* a State's legitimate concern to

the three specific areas mentioned, and to preclude all others. And, indeed, this appears to be clearly confirmed in *Paris Adult Theater I v. Slaton,* supra, where the court rejected the argument that the films in question acquired constitutional immunity where they were exhibited solely to consenting adults, with no evidence of pandering or invasion of privacy of the non-consenting public generally. Said the court:

> ". . . this Court has never declared these to be the only legitimate state interests permitting regulations of obscene material."

Appellant's fourth assignment of error is accordingly overruled.

V.

Next, appellant argues that the trial court erred in failing to grant appellant's motion to dismiss at the conclusion of the State's case for failure to establish a prima facie case. To the extent that appellant's argument under this assignment is directed toward the alleged necessity for the introduction by the State of evidence of distribution to juveniles, invasion of privacy, or pandering, the assignment is answered by our disposition of assignment of error numbered four above. The balance of this prolix assignment of error and argument thereunder is addressed to the alleged failure of the State to adduce evidence sufficient to constitute a prima facie case, of the three elements required by the *Roth-Memoirs* cases for the proscription of obscenity, and of their coalescence therein. Since we understand the law to be that the publications are themselves the best evidence of their own character, and, where placed before the triers of the facts under proper instructions, do not require expert or other commentary or formal gloss, or testimony relating them to national contemporary

community standards, we find the balance of this assignment of error to be without merit. *Paris Adult Theater I v. Slaton,* 93 S.Ct. 2628 (slip opinion at pp. 6-7, esp. footnote 6 on p. 7).

VI.

The appellant's sixth assignment of error argues that the trial court erred in not dismissing the case at the end of appellant's case, where the State offered no evidence in chief, nor rebuttal evidence, as to the presence of the three elements required under *Roth-Memoirs* decisions, and of their coalescence therein. Since, as previously noted, the publications were themselves placed in evidence and were before the jury to consider, for the reasons noted in our disposition of assignment of error numbered five above, we find no error in the failure of the trial court to dismiss this cause at the conclusion of appellant's case. Accordingly, appellant's sixth assignment of error is overruled.

VII.

Appellant's seventh assignment of error addresses itself to alleged error in the trial court's charge to the jury, namely, in refusing to give certain charges specifically requested, in erroneously charging on national community standards, on the elements of obscenity and scienter, and in refusing to respond properly to a question posed by the jury. A careful reading of the charge by the trial court convinces us that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio statute, and generally in its responsibilities and duties as triers of the facts. Those charges specially requested by appellant and refused by the trial court were denied as either subsumed

in the general charge and therefore redundant, or as otherwise improper or misleading. We find no error prejudicial to appellant in their refusal, nor in the response by the trial court to the query of the jury. As to appellant's argument, contained in his Supplemental Brief, that the *Miller* decision fatally weakens any conviction not under the *Roth-Memoirs* test, we refer to our examination of this issue in appellant's third assignment of error.

Appellant's seventh assignment of error is overruled.

VIII.

Next, appellant argues that the "systematic exclusion" of young jurors from service on juries dealing with obscenity cases violated appellant's right to an impartial jury under the Sixth and Fourteenth Amendments of the Constitution of the United States. The record reveals that the customary procedure was followed in this case, of using a 1970 poll book to draw at random a venire of potential jurors. No suggestion is made, and none is present in the record, that any legal or constitutional irregularity exists with respect to venire so selected or to the method of selecting it, *except* to the extent that it necessarily excluded those under twenty-one years of age (twenty-three years at the time of trial in 1972) not then eligible to vote and therefore not included in the 1970 poll books. We find this procedure totally unlike the purposeful and systematic exclusion of racial groups held improper in *Swain v. Alabama*, 380 U.S. 202, and have been directed to no authority which would require us to hold otherwise. Indeed, the argument advanced by appellant invites a reductio ad absurdum rejoinder: if we must constitutionally include eighteen year olds to make up an impartial jury, why not sixteen year olds, who, after all, are permitted, under certain circumstances,

to marry; or fourteen year olds who have achieved (or suffered) puberty; and if registered voters are included, why not citizens not so registered, including those imprisoned for crimes? It is obvious to us that some technically feasible method for selecting potential jurors reasonably calculated to secure and which does in fact secure a random unpremeditated sampling of citizens will, together with other protective procedures such as voir dire examination, peremptory challenges and challenges for cause, and the presence of an impartial magistrate instructing the jury on matters of law and procedure, satisfy the requirements of the Sixth and Fourteenth Amendments for an impartial jury, without the necessity of finding twelve persons precisely proportioned in age, sex, race, socioeconomic status, religion, etc. to their larger counterparts in society. Appellant's eighth assignment of error is without merit.

IX.

Appellant's ninth assignment of error asserts that the verdict is against the manifest weight of the evidence and is contrary to law. We have examined the record, including the publications in question, and have concluded that there is present in the record substantial credible evidence of probative value as to each element of the offense charged. Appellant's ninth assignment of error is accordingly overruled.

X.

Finally, appellant asserts by way of his tenth assignment of error, that the constitutional test formulated by the Supreme Court of the United States, incorporated into and applied by the State in the prosecution of this case (that is, *Memoirs v. Massachusetts*, 383 U.S. 413), was "completely and totally repudiated" by the Supreme Court

in *Miller v. California*, 93 S.Ct. 2607, and that the retroactive application of the *Miller* test to sustain the instant judgment would offend the Fourteenth Amendment of the Constitution of the United States.

The point is not contested by the appellee, the State arguing that the retroactive application of *Miller* is not sought by the appellee and that the judgment against appellant should and can be sustained on the basis of existing law at the time of the convictions. This position impliedly argues that *Miller* did not so "completely and totally repudiate" the previous obscenity test *that any conviction secured thereunder* is necessarily infirm. We agree, for the reasons in our disposition of appellant's third assignment of error. Accordingly, we overrule appellant's tenth assignment of error.

It is, therefore, the order of this Court, that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

TESS, *P. J.*, SHANNON and PALMER, *J. J.*

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX C

Notice of Appeal to the Supreme Court of the United States

Court of Appeals No. 72-345

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

STATE OF OHIO,
Plaintiff-Appellee,

-vs-

QUEEN CITY NEWS, INC.,
JOHN MARSHALL
Defendants-Appellants.

NOTICE OF APPEAL

Notice is hereby given pursuant to Rule 10, United States Supreme Court Rules that Queen City News, Inc. and John Marshall, defendants-appellants, hereby appeal to the Supreme Court of the United States from the denial of the Supreme Court of Ohio of appellants' leave to appeal entered in this action May 10, 1974, and its denial of a motion for reconsideration June 6, 1974.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

/s/ BERNARD A. BERKMAN
HAROLD L. LEVEY
BERKMAN, GORDON & KANCELBAUM
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
781-5245
Counsel for Appellants

CERTIFICATE OF SERVICE

A copy of the within Notice of Appeal was served upon Simon L. Leis, Hamilton County Prosecutor, 420 Hamilton County Court House, Cincinnati, Ohio 45202, counsel of record for appellee, by depositing same in a U.S. Post Office mail box, so addressed, with first class postage prepaid, this 21st day of August, 1974. All parties required to be served have been served.

A copy of the within Notice of Appeal was mailed to the Clerk, Supreme Court of Ohio, Columbus, Ohio, this 21st day of August, 1974.

/s/ BERNARD A. BERKMAN
Counsel for Appellants

APPENDIX D

Relevant Provisions of Ohio Revised Code

[Former] § 2905.34 Definitions.

As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

[Former] § 2905.35 [Production or dissemination of obscene material or performances.]

No person, with knowledge of the content amd character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both.

[Former] § 2905.38 [Knowledge of obscene matter, when presumed.]

(A) An owner or manager of a theater, bookstore, magazine stand, or other commercial establishment engaged in the business of selling materials or exhibiting performances, who, in the course of business possesses six or more identical or substantially similar obscene articles, having knowledge of their content and character, is presumed to possess them with intent to violate section 2905.35 of the Revised Code.

(B) An owner or manager of a theater, bookstore, magazine stand, or other commercial establishment engaged in the business of selling materials or exhibiting performances, who, in the course of business does any

of the acts prohibited by section 2905.35 or 2905.36 of the Revised Code, is presumed to have knowledge of the content and character of the material or performance involved, if he has actual notice of the nature of such material or performance, whether or not he has precise knowledge of its content and character. Actual notice of the nature of such material or performance may be given to such person by notice in writing from the prosecuting attorney of the county or chief legal officer of the municipality in which such person resides or does business, stating that such material or performance is obscene. If such prosecuting attorney or chief legal officer obtains a declaratory judgment against such person under sections 2721.01 to 2721.15, inclusive, of the Revised Code, declaring that such material or performance is obscene, and publication of such judgment is made within two days of such judgment in a newspaper of general circulation in such county or municipality, all persons residing or doing business in such county or municipality are presumed to have actual notice of the nature of such material or performance. Any person receiving the notice in writing from the prosecuting attorney of the county or chief legal officer of the municipality in which such person resides or does business may bring an action against such prosecuting attorney or chief legal officer for a declaratory judgment to determine whether such material or performance is obscene, and if judgment is rendered in favor of such person, he shall be allowed his costs.

(C) It is a defense to a charge brought under section 2905.35 of the Revised Code, that the obscene material was disseminated or the obscene performance was presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, li-

brarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

[Current] § 2907.01 Definitions. As used in sections 2907.01 to 2907.37 of the Revised Code:

(A) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(B) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(C) "Sexual activity" means sexual conduct or sexual contact, or both.

(D) "Prostitute" means a male or female who promiscuously engages in sexual activity for hire, regardless of whether the hire is paid to the prostitute or to another.

(E) Any material or performance is "harmful to juveniles," if it is offensive to prevailing standards in the adult community with respect to what is suitable for juveniles, and if any of the following apply:

(1) It tends to appeal to the prurient interest of juveniles;

(2) It contains a display, description, or representation of sexual activity, masturbation, sexual excitement, or nudity;

(3) It contains a display, description, or representation of bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a display, description, or representation of human bodily functions of elimination;

(5) It makes repeated use of foul language;

(6) It contains a display, description, or representation in lurid detail of the violent physical torture, dismemberment, destruction, or death of a human being;

(7) It contains a display, description, or representation of criminal activity which tends to glorify or glamorize such activity, and which with respect to juveniles has a dominant tendency to corrupt.

(F) When considered as a whole, and judged with reference to ordinary adults, or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to such group, any material or performance is "obscene" if any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way which inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;

(5) It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity,

bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

(G) "Sexual excitement" means the condition of human male or female genitals when in *a state of sexual* stimulation or arousal.

(H) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering of any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(I) "Juvenile" means an unmarried person under the age of eighteen.

(J) "Material" means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record or tape, or other tangible thing capable of arousing interest through sight, sound, or touch.

(K) "Performance" means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.

[Current] § 2907.32 Pandering obscenity.

(A) No person, with knowledge of the character of the material or performance involved, shall do any of the following:

(1) Create, reproduce, or publish any obscene material, when the offender knows that such material is to

be used for commercial exploitation or will be publicly disseminated or displayed, or when he is reckless in that regard;

(2) Exhibit or advertise for sale or dissemination, or sell or publicly disseminate or display any obscene material;

(3) Create, direct, or produce an obscene performance, when the offender knows that it is to be used for commercial exploitation or will be publicly presented, or when he is reckless in that regard;

(4) Advertise an obscene performance for presentation, or present or participate in presenting an obscene performance, when such performance is presented publicly, or when admission is charged;

(5) Possess or control any obscene material with purpose to violate division (A) (2) or (4) of this section.

(B) It is an affirmative defense to a charge under this section, that the material or performance involved was disseminated or presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

(C) Whoever violates this section is guilty of pandering obscenity, a misdemeanor of the first degree. If the offender has previously been convicted of a violation of this section or of section 2907.31 of the Revised Code, then pandering obscenity is a felony of the fourth degree.

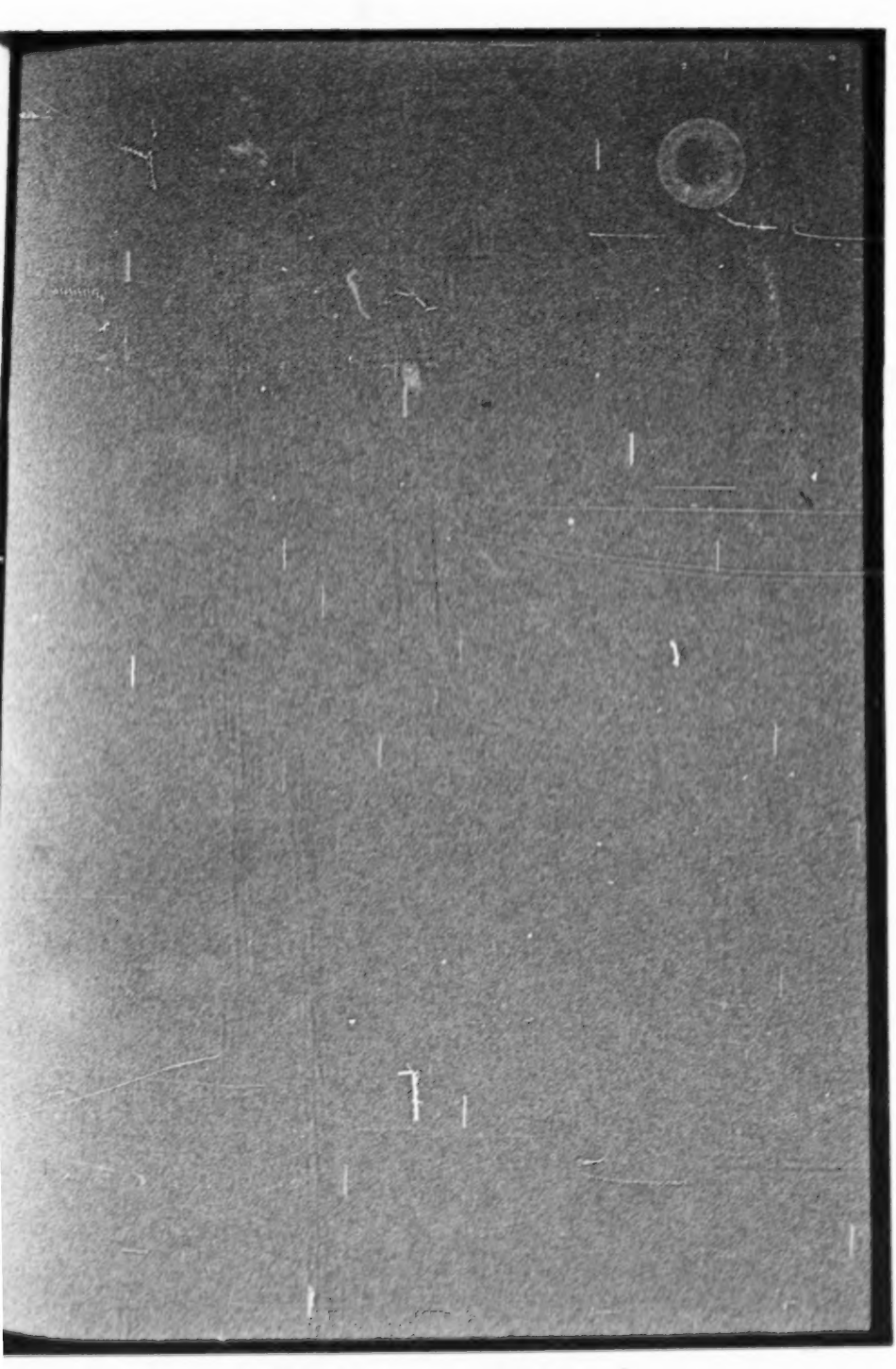
[Current] § 2907.35 Presumptions; notice.

(A) An owner or manager, or his agent or employee, of a bookstore, newsstand, theater, or other commercial establishment engaged in selling materials or exhibiting performances, who, in the course of business:

(1) Possesses five or more identical or substantially similar obscene articles, having knowledge of their character, is presumed to possess them in violation of division (A) (5) of section 2907.32 of the Revised Code;

(2) Does any of the acts prohibited by section 2907.31 or 2907.32 of the Revised Code, is presumed to have knowledge of the character of the material or performance involved, if he has actual notice of the nature of such material or performance, whether or not he has precise knowledge of its contents.

(B) Without limitation on the manner in which such notice may be given, actual notice of the character of material or a performance may be given in writing by the chief legal officer of the jurisdiction in which the person to whom the notice is directed does business. Such notice, regardless of the manner in which it is given, shall identify the sender, identify the material or performance involved, state whether it is obscene or harmful to juveniles, and bear the date of such notice.



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-225

JOHN MARSHALL AND QUEEN CITY NEWS, INC.,
Appellants,

vs.

STATE OF OHIO,
Appellee.

On Appeal From The Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-225

JOHN MARSHALL AND QUEEN CITY NEWS, INC.,
Appellants,

vs.

STATE OF OHIO,
Appellee.

On Appeal From The Supreme Court of Ohio

MOTION OF APPELLEE TO DISMISS APPEAL

Now comes the State of Ohio, Appellee, by Simon L. Leis, Jr., Prosecuting Attorney of Hamilton County, Ohio, and Leonard Kirschner and Robert R. Hastings, Jr., Assistant Prosecuting Attorneys, of Hamilton County, Ohio, and respectfully move this Court for an order dismissing the appeal for the reason that there has been no denial of Appellant's Constitutional rights in the proceedings below as reflected in the record of trial proceedings and the opinions and rulings of the Court of Appeals and the Supreme Court of Ohio.

OPINIONS BELOW

The brief of the Appellant correctly cites the opinions and judgments below. The opinion of the Court of Ap-

peals is unreported but is reproduced and attached as Appendix A, together with its opinion in the companion case of *State of Ohio* v. *Michael Kensinger,* which opinion is referred to by the Court of Appeals in *Queen City.*

JURISDICTIONAL STATEMENT

The appeal of Appellants from the order of the Supreme Court of Ohio entered May 10, 1974, reconsideration denied June 6, 1974, which dismissed their appeal from the Court of Appeals for Hamilton County, Ohio (First Appellate District) for the reason that no substantial constitutional question was presented, presents the question whether the Appellants' convictions for violating Sections 2905.34, 2905.35 and 2905.38, Ohio Revised Code, was consistent with the First, Fourth, and Fourteenth Amendments to the United States Constitution.

STATUTES INVOLVED

The statutes involved are Sections 2905.34, 2905.35 and 2905.38, Ohio Revised Code. Effective January 1, 1974, the statutory provisions under which Appellants were convicted (Sections 2905.34, 2905.35 and 2905.38) were repealed, and Sections 2907.01, 2907.32 and 2907.35, Ohio Revised Code were enacted. These statutes have not been reviewed as yet by the appellate court and therefore have no bearing on the issues before this Court. Prior to Sections 2905.34, 2905.35 and 2905.38 (under which appellants were convicted) being enacted Section 2905.34, Ohio Revised Code, was the primary obscenity statute in Ohio. Copies of Sections 2905.34, 2905.35 and 2905.38 and former Section 2905.34 are attached as Appendix B.

QUESTIONS PRESENTED

The Appellants raise seven (7) questions in this appeal:

(1) Whether Ohio Revised Code Sections 2905.34 and 2905.35, the statutes under which appellants were charged, tried and convicted, are void for overbreadth or vagueness.

(2) Whether Ohio Revised Code Section 2905.38 is void for creating an unreasonable presumption of an intent to violate the obscenity laws, an element of the offense charged.

(3) Whether evidence received at trial was illegally obtained and should have been suppressed as a product of an illegal search and seizure for any or all of the following reasons:

(a) Probable cause did not exist for issuance of the search warrant.

(b) The search warrant failed to meet Fourth Amendment specificity requirements.

(c) The search warrant was issued without a prior judicial determination of the obscenity of any of the seized materials.

(d) An adversary hearing prior to the mass seizure of materials to which First Amendment protection may be claimed was constitutionally compelled.

(e) The search and seizure actually conducted by officers executing the search warrant was a general search and seizure.

(4) Whether the prosecution failed to prove the essential elements of its case in failing to establish that the appellants possessed guilty knowledge and guilty purpose.

(5) Whether the materials forming the basis for the forty-one (41) counts upon which appellants' convictions rest are constitutionally protected expression.

(6) Whether the trial court erroneously charged the jury in defining the elements of the crime charged by defining "average person" in the community to include, *inter alia,* the "young" and "children".

(7) Whether the trial court erroneously limited defense counsels' *voir dire* examination of the jury.

STATEMENT OF THE CASE

Appellants, Queen City News, Inc., a Delaware corporation, and John Marshall an individual, were jointly indicted for violation of Ohio Revised Code Section 2905.35 which prohibits, *inter alia,* possession of obscene materials, as defined in Ohio Revised Code Section 2905.34, with intent to sell or distribute them. The appellants were charged with forty-one separate counts involving a phonograph record (Court 1), rubber goods (Counts 2 and 3), motion picture films (Counts 4, 5 and 6) and paperback books and magazines (Counts 7 through 41).

On January 19, 1972, Specialist Ray Easterling, a police officer with the Cincinnati Police Department, Vice Control Section, had a conversation with an informant who represented himself as a former employee of the Queen City News, Inc., located at 5211 Creek Road, Blue Ash, Hamilton County, Ohio. (R 85) [1]

The informant described the operation of the warehouse as a wholesale distribution center for various materials, that

[1] "R———" refers to pages of the record of the state trial court proceedings.

in the context of his vernacular were described as obscene (R 124, 142). Subsequently, Specialist Easterling went to independently investigate the warehouse to corroborate and verify the information he had previously received (R 87-89, 125-127). At the warehouse he observed a book entitled "Sex in America" with which he was already familiar, and characterized in his opinion as obscene (R 92).

This information was presented on January 20, 1972 to the Honorable William J. Morrissey, Court of Common Pleas, Hamilton County, Ohio, who issued a search warrant for the above described premises. The search warrant was executed and single copies of various publications, films, rubber goods and a record were seized for evidentiary purposes (R 149-150). Of the seized items forty-one were presented to the Hamilton County Grand Jury, which returned an indictment against John Marshall, and the corporation, Queen City News, Inc.

Various pretrial motions, including a motion to suppress, were filed and heard prior to trial, the same being overruled. During the empaneling of the jury an extensive and searching voir dire examination (R 196-610) of prospective jurors was permitted by the trial court.

After presenation of evidence and arguments by both parties the trial court properly instructed the jury as to the law to be applied to the facts (R 1171-1188) utilizing the *Roth-Memoirs* definition of obscenity. Upon due deliberation the jury returned a verdict of guilty as to both defendants on all forty-one counts of the indictment (R 1202-1203, 1205-1207). Sentence was imposed according to law (R 1220).

In the assignments of error to the Court of Appeals, appellants argued, *inter alia*, that the trial court erred in overruling their motions to dismiss on the ground that the sec-

tions upon which the indictment was based violated the United States Constitution, erred in overruling their pretrial motion to suppress evidence, erred in overruling their motion to dismiss on the ground that the materials were constitutionally protected expression, erred in overruling their motion for acquittal upon the ground that the prosecution failed to prove guilty knowledge and guilty intent, erred in overruling defendant's objections to the Court's charge to the jury, and erred in limiting defense counsels' *voir dire* examination of the jury. The Court of Appeals, First Appellate District, Hamiltion County, Ohio, which considered Appellants' assignments of error in light of *Miller* v. *California*, 413 U.S. 15 (1973), and its companion cases, affirmed the judgment of the trial court on January 14, 1974.

Appellants sought leave to appeal the affirmance of their convictions by the Court of Appeals to the Supreme Court of Ohio. In support thereof, appellants, in their written memorandum in support of jurisdiction, set forth, *inter alia*, the issues that had been presented to the appellate court for consideration. On May 10, 1974, the Supreme Court of Ohio denied appellants' leave to appeal on the ground that no substantial constitutional question was presented. Appellants filed their motion for reconsideration on May 17 and on June 6, 1974, the Court affirmed its decision.

ARGUMENT

1. OHIO REVISED CODE SECTIONS 2905.34 AND 2905.35 ARE UNCONSTITUTIONAL.

Subsequent to the convictions of the Appellants the Ohio General Assembly enacted a new criminal code which contains Sections 2907.01, 2907.32 and 2907.35 which became

effective January 1, 1974. These statutory provisions replaced the statutory provisions under which Appellants were convicted, Sections 2905.34, 2905.35 and 2905.38, Ohio Revised Code.

Section 2905.35, Ohio Revised Code (formerly Section 2905.34, Ohio Revised Code) upon which Appellants were charged and convicted prohibits, *inter alia*, possession of obscene materials with intent to sell or distribute them. Section 2905.34, Ohio Revised Code, sets forth in detail definitions for the following:

> "As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive of the Revised Code:
>
> (A) Any material or performance is 'obscene' if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:
>
> (1) Its dominant appeal is to prurient interest;
>
> (2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;
>
> (3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
>
> (4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral or artistic purpose.
>
> (B) 'Nudity' means the showing, representation, or depiction of human male or female genitals, pubic

area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

C) 'Sexual excitement' means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) 'Sexual conduct' means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, public area, buttocks, or, if such person is a female, a breast.

(E) 'Material' means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) 'Performance' means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience."

Recently this Court denied certiorari in *Boyd* v. *Ohio,* No. 73-1339, — U.S. —, 94 S. Ct. 3230 (1974), where the predecessor to Ohio Revised Code Sections 2905.34 and 2905.35 (under which Appellants were convicted), Section 2905.34, was challenged as being unconstitutional for lacking the specificity required by *Miller* v. *California,* 413 U.S. 15 (1973). The former Section 2905.34, reviewed in *Boyd* v. *Ohio, supra,* prohibited "the sale . . . an obscene, lewd or lascivious book . . ." Clearly the definition section, Section 2905.34 (under which Appellants were convicted), is much more explicit than the former statute thereby supplying the requisite constitutional specificity.

Accordingly, Sections 2905.34 and 2905.35 are not constitutionally infirm for either overbreadth or vagueness, in

violation of the First and Fourteenth Amendments to the United States Constitution.

Appellee contends that Section 2905.34, Ohio Revised Code, (under which Appellants were convicted), states with sufficient clarity what material will be considered "obscene" so as to meet the specificity required by *Miller* v. *California, supra.* Compared to the examples set forth in *Miller* as to the types of material which a statute might proscribe as portraying sexual conduct in a patently offensive way, 413 U.S., at 25-26, Section 2905.34 proscribes by specific definition patently offensive "hard core" sexual conduct of a similar nature.

This Court emphasized in *Hamling* v. *United States,* — U.S. —, 94 S. Ct. 2887 (1974), that:

> "The *Miller* cases, important as they were in enunciating a constitutional test for obscenity to which a majority of the Court subscribed for the first time in a number of years, were intended neither as legislative drafting handbooks or as manuals of jury instructions." 94 S. Ct. at 2906.

In addition, the Court in *Hamling, supra,* reaffirmed its stand announced in *Miller,* 413 U.S., at 24, n. 6, that the Court's decision in *Miller* was not intended to hold all state statutes inadequate recognizing that existing statutes "as construed heretofore or hereafter, may well be adequate." 94 S. Ct. at 2905.

Since the Court's decision in *Miller* a number of courts have authoritatively construed obscenity statutes to supply the judicial gloss necessary to meet the specificity requirements of *Miller.* See: *People* v. *Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 443 (Ct. App. 1973); *Redlich* v. *Capri Cinema, Inc.,* 349 N.Y.S. 2d 697, 700 (Sup. Ct., App. Div. 1973); *United States* v. *Palladino,* 390 F. 2d 499, 501 (1st

Cir. 1974); *Price* v. *Commonwealth*, 201 S.E. 2d 798 (Va. 1974); *Gibbs* v. *State*, 504 S.W. 2d 719, 724 (Ark. 1974); *State ex rel. Chobot* v. *Circuit Ct. for Milwaukee City*, 212 N.W. 2d 690, 698 (Sup. Ct. Wis. 1973); *United States* v. *Thevis*, 484 F. 2d 1149 (5th Cir. 1973); *State* v. *J-R Distribs, Inc.*, 512 P. 2d 1049, 1060 (Wash. 1973); *Rhodes* v *State*, 283 So. 2d 351, 355-356 (Fla. 1973).

Likewise, the Ohio Supreme Court has the power to supply judicial gloss through authoritative construction regardless of the degree of specificity contained in the statute as drafted by the Ohio General Assembly.

Upon remand from this Court the Ohio Supreme Court in *State ex rel. Keating* v. *"Vixen"*, 35 Ohio St. 2d 215, 219 (1973), held that Sections 2905.34 and 2905.35 Ohio Revised Code, comport with the standards enunciated in *Miller*. In *State ex rel. Ewing* v. *"Without A Stitch"*, 37 Ohio St. 2d 95, 101 (1974), the Ohio Supreme Court reaffirmed its holding in *"Vixen"* by stating that Section 2905.34, Ohio Revised Code, is not overbroad. Appellee contends this interpretation by the Ohio Supreme Court is correct.

In *Jenkins* v. *Georgia*, —— U.S. ——, 94 S. Ct. 2750 (1974), this Court observed, "Nothing in the movie ("Carnal Knowledge") falls within either of the two examples given in *Miller* of material which may constitutionally be found to meet the "patently offensive" element of those standards, nor is there anything sufficiently similar to such material to justify similar treatment . . . . There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards." 94 S. Ct. at 755. Appellee respectfully submits Section 2905.34, Ohio Revised Code, does not prohibit nudity alone and therefore it is not void for unconstitutional overbreadth.

Appellee contends that Sections 2905.34 and 2905.35, Ohio Revised Code, (under which appellants were convicted), specify in detail what types of activity and material and/or performance are prohibited so as to meet constitutional muster. The authoritative construction of the subject statutes by the Ohio Supreme Court further evidences that the statutes are not overbroad or vague so as to be constitutionally defective.

II. OHIO REVISED CODE SECTION 2905.38 IS VOID FOR CREATING AN UNREASONABLE PRESUMPTION.

Section 2905.38, Ohio Revised Code, provides, in pertinent part:

> "(A) An owner or manager of a theater, bookstore, magazine stand, or other commercial establishment engaged in the business of selling materials or exhibiting performances, who, in the course of business possesses six or more identical or substantially similar obscene articles, having knowledge of their content and character, is presumed to possess them with intent to violate section 2905.35 of the Revised Code."

In *Milky Way Productions, Inc.* v. *Leary*, 305 F.Supp. 288 (S.D.N.Y. 1969), *aff'd* 397 U.S. 98 (1970), a New York statute similar to Section 2905.38, Ohio Revised Code, was attacked as creating an unreasonable presumption. The District Court stated that where, as in the case at bar, Appellants merely assume facts, contrary to what the legislature assumed, and announce the latter's irrationality the court should abstain from deciding the issue. 305 F.Supp., at 298.

Whether a statutory presumption is valid is a question on which factual investigation may serve as a basis for judicial determinations. Such empirical determinations are properly the province of state judges. No empirical basis was made in the state courts upon which this court could determine the rationality of the presumption.

As Section 2905.38 is presently worded, the presumption that possession of six or more identical or similar obscene materials is presumed to be with intent to violate Section 2905.35, Ohio Revised Code, is unlikely to infringe upon protected activity of citizens. See, e.g., *Overstock Book Co., Inc.* v. *Barry,* 305 F.Supp. 842 (E.D.N.Y. 1969).

Appellee contends that the statutory presumption created by Section 2905.38, Ohio Revised Code, is rational and meets constitutional standards. *Turner* v. *United States,* 396 U.S. 398 (1970); *United States* v. *Gainey,* 380 U.S. 63, 67 (1965).

III. THE EVIDENCE WAS ILLEGALLY OBTAINED AND SHOULD HAVE BEEN SUPPRESSED.

The materials obtained pursuant to the execution of a search warrant issued by a judge were properly admitted into evidence for the following reasons:

(A) Probable cause was established upon which the search warrant could be issued. There is no dispute that the judge authorizing the search of the premises was neutral and detached. Here, the informant was a former employe of Queen City News, Inc. who knew what materials were stored in the warehouse and who had delivered such materials as a route man serving customers.

Officer Easterling conducted an independent investigation to corroborate and verify the information he received from the informant. He verified that Queen City News was at the location indicated, that the doors were electronically locked, that there were large metal cabinets in the warehouse, that there were stacks of magazines and books in cartons and on shelves in the warehouse (R 125-127). In addition Officer Easterling observed one publication, "Sex In America", which, in his opinion was obscene (R 92).

Such facts, coupled with the background afforded by the informant supplied the magistrate with substantial basis to establish probable cause that a crime was being committed. *Harris* v. *United States,* 403 U.S. 573 (1973); *Draper* v. *United States,* 358 U.S. 307 (1959).

This Court has said that "when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner". *United States* v. *Ventresca,* 380 U.S. 102, 109 (1965).

The mere fact that Officer Easterling had never used this informant before should not automatically label the informant as unreliable. To so hold would necessarily do away with informants since no one could ever qualify as a reliable informant the first time. *State* v. *Haynes,* 25 Ohio St. 2d 264, 268 (1971).

(B) The evidence at the motion to suppress revealed that the police took only a single copy of each

item seized (R 149-150). Furthermore, the warehouse was not put out of business as a result of the seizure of the some 1,400 items pursuant to the search warrant.

In *Heller* v. *New York,* 413 U.S. 483 (1973), the Court stated in pertinent part as follows:

> "This court has never held, or even implied that there is an absolute First or Fourteenth Amendment right to a prior adversary hearing applicable to all cases where allegedly obscene material is seized . . . . In particular, there is no such right where allegedly obscene material is seized, pursuant to a warrant, to preserve the material as evidence in a criminal prosecution. . . ."

Accordingly, Appellants' Fourth and Fourteenth Amendment rights were not abridged in the case at bar.

(C) Where the search warrant set forth specifically what materials were to be seized and only single samples of a large inventory were seized to be used as evidence in proceedings to follow, such search is not a general search.

IV. APPELLANTS WERE UNLAWFULLY CONVICTED WITHOUT PROOF OF GUILTY KNOWLEDGE AND GUILTY PURPOSE.

The record of the state court proceedings contains sufficient credible and probative evidence to prove beyond a reasonable doubt the element of scienter. State Exhibits #2-#15 are photograph pictures of the interior of Appellants' warehouse which depict thousands upon thousands of copies of sexually explicit items (R 634-637). All these exhibits were admitted into evidence (R 692) thereby affording the jury the opportunity to consider them during their deliberation as to the issue of scienter.

Additionally, Sergeant Thomas Fox, Cincinnati Police Department, Vice Control Section, testified that there were 30 to 40 duplicates of Exhibit #17 (false vagina) and 15 to 20 duplicates of Exhibit #18 (false penis) present in the warehouse at the time the search warrant was executed (R 640-641). Furthermore, Detective Phillip Endres, Hamilton County Sheriff's Patrol, testified there were stacks of books and magazines in the warehouse wrapped in cellophane that were similar in nature (R 773-775).

Scienter, like any criminal intent, is not easily ascertained and must often be proved by circumstantial evidence. An examination of all the evidence in this case reveals that it is quite apparent the Appellants were aware of the character of the materials in the warehouse. *Mishkin* v. *New York*, 383 U.S. 502, 510 (1966). This Court commented in *Smith* v. *California*, 361 U.S. 147, at 154 (1959):

> "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial."

Surely this observation is as valid today as it was when it was originally made. The facts, a warehouse stocked with thousands of copies of obscene material, lead one to only one conclusion — Appellants were fully aware of the character of the material. The evidence demonstrated that Sergeant Fox observed no magazines or books which dealt with anything other than a sexual theme (R 643).

The statutory language, evidence, and instructions by the trial court in this case satisfy the constitutional requirements of scienter. *Hamling* v. *United States, supra.*

V. THE MATERIALS ARE CONSTITUTIONALLY PROTECTED EXPRESSION.

Ever since this Court's decision in *Roth* v. *United States,* 354 U.S. 476 (1957), it has been an established principle of constitutional law that obscenity is not protected by the First Amendment. This proposition has been reaffirmed on several occasions by the Court. *Miller* v. *California, supra; Kois* v. *Wisconsin,* 408 U.S. 229 (1972); and *United States* v. *Reidel,* 402 U.S. 351 (1972).

Appellee contends that no Ninth Amendment rights extent to the subject materials in this case. The Court in *Paris Adult Theatre I* v. *Slaten,* 413 U.S. 49 (1973), stated, "commerce in obscene material is unprotected by any constitutional doctrine of privacy."

The jury after examining all the evidence and applying the law to the facts as instructed by the trial court concluded that the forty-one items were obscene materials. After an independent review of the items the Court of Appeals for the First Appellate District of Ohio reached the same conclusion. These items are classic examples of hard core pornography which are unprotected under the United States Constitution.

VI. THE TRIAL COURT ERRONEOUSLY CHARGED THE JURY IN DEFINING THE ELEMENTS OF THE CRIME.

The trial court's general charge to the jury was competent, comprehensive and correct in stating the law with regard to the elements required to be proven by the State in the prosecution of a crime charged under Section 2905.-35, Ohio Revised Code.

After a careful reading of the general charge of the trial court the Court of Appeals held that the jury was "adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio statute, and generally in its responsibilities and duties as triers of fact".

Accordingly, no prejudicial error can be shown pertaining to the court's charge, taken as a whole. This Court has frequently held that "jury instructions are to be judged as a whole, rather than picking isolated phrases from them." *Boyd* v. *United States,* 271 U.S. 104, 107 (1926); *Hamling* v. *United States, supra,* at 2902.

VII. THE TRIAL COURT ERRONEOUSLY LIMITED DEFENSE COUNSELS' VOIR DIRE EXAMINATION OF THE JURY.

Examination at the state court trial proceedings reveals that voir dire examination of the jury was extensive and searching (R 196-610). The trial court permitted wide latitude to both appellants in their questioning of the prospective jurors. There is no evidence in the record that discloses that the trial court abused its discretion or

that the strictures placed upon the interrogation of the jurors prejudiced the accused.

The examination was clearly sufficient to test the qualifications and competency of the prospective jurors. Failure to permit certain questions did "not reach the level of a constitutional violation", *Ham* v. *South Carolina,* 409 U.S. 524, 528 (1973); *Hamling* v. *United States, supra,* at 2919.

CONCLUSION

It is respectfully submitted that Sections 2905.34, 2905.35 and 2905.38, Ohio Revised Code are not overbroad or vague; and that the trial and convictions of the Appellants was fair and consistant with the First, Fourth and Fourteenth Amendments of the United States Constitution.

For these reasons, Appellee respectfully submits that the Motion to Dismiss this appeal should be allowed and the appeal dismissed.

Respectfully submitted,

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APPENDIX A

OPINION OF THE COURT OF APPEALS FOR HAMILTON COUNTY, OHIO

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-72345

STATE OF OHIO,
Plaintiff-Appellee,

vs.

QUEEN CITY NEWS, INC.

and

JOHN MARSHALL,
Defendants-Appellants.

DECISION
(Dated January 14, 1974)

Per Curiam.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and arguments of counsel.

Appellant, Queen City News, Inc., presents by way

of brief and supplement thereto, thirteen assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of appellant, Queen City News, Inc., and a jointly tried co-defendant, John Marshall, under Section 2905.35, Ohio Revised Code, a misdemeanor section proscribing the production or dissemination of obscene material.

Appellant, John Marshall, presents by way of brief and supplement thereto, sixteen assignments of error.

These assignments of error will be considered below first in the order raised by appellant, Queen City News, Inc., and second in the order raised by appellant, John Marshall.

We note that this Court this day has decided State of Ohio v. Michael Kensinger, case number C-73008, unreported, wherein many of the issues raised are similar to those broached by the assignments of error in the instant case. Additionally, we note that counsel for Michael Kensinger, defendant-appellant, in case number C-73008, is the same counsel representing appellant, John Marshall, herein, and that counsel for appellant, Queen City News, Inc. is his associate.

Therefore, in diposing of some of the assignments of error asserted by the appellants in this case, reference will be made to our rulings in Kensinger, infra, where the reasons therefore apply to the assignments here before us.

Assignments of Error, Queen City News, Inc.:

I.

Queen City asserts that the statute upon which the indictment was based violates the First and Fourteenth Amendments to the United States Constitution.

This assignment is not well taken for the reasons set forth in our rulings upon the third and fourth assignments of error in Kensinger, supra.

II.

This assignment overlaps the first in that the contention is that the indictment failed to charge an offense punishable within the permissible limits of the First and Fourteenth Amendments to the United States Constitution. We find it not to be well taken for the reasons set forth in the disposition of the fourth assignment of error in *Kensinger*, supra.

III.

Appellant alleges that the trial court erred in overruling the pretiral motion to suppress evidence obtained in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

It is argued first in support of this assignment that special First Amendment principles apply which require a prior adversary hearing before seizure.

Despite the fact that some 1400 separate items, including books, magazines, film, phonograph records and rubber goods were seized and removed from a warehouse, there is nothing to show that more than one copy of a book, magazine or other item was taken by the police officers conducting the search. There is testimony that the warehouse contained from 100,000 to 200,000 items, there being numerous copies of each publication and duplications of the rubber goods. It is undisputed that the business of appellant was not shut down not interrupted for more than several hours.

In deciding *State* v. *Albini* (1972), 31 Ohio St. 2d 27, the court remarked at page 30 of the opinion:

> ". . . , we do not read the above cited Supreme Court decisions as demanding that in every case where a seizure of alleged obscene material is to be made, a preseizure adversary hearing is constitutionally required. Whether or not such a hearing is necessary must depend upon the nature and purpose of the seizure."

Just as in *Albini,* supra, the seizures now before us were not made for the purpose of preventing the dissemination of that which the various books, magazines, films and phonograph records contained nor preventing the sale of the rubber goods. Rather, the single samples were taken for the purpose of preserving them in order that they might be used as evidence in proceedings to determine whether their exhibitors were guilty of committing a crime.

Subsequent to the decision in *Albini,* the Supreme Court of the United States decided *Heller* v. *New York,* 93 S.Ct. 2789 (1973), the first headnote of which is:

> "There is no absolute First or Fourteenth Amendment right to a prior adversary hearing where allegedly obscene material is seized pursuant to warrant to preserve material as evidence in a criminal prosecution."

This squares with the syllabus in *Albini*:

> "Where, incident to a lawful arrest upon a charge of exhibiting an obscene motion picture film, a single copy of the film is seized as evidence to be used in support of the charge, the fact that, prior to its seizure, no adversary hearing had been held upon the question of the obscenity of the film does not require reversal of a conviction for its unlawful exhibition."

Consequently, as we noted in our ruling on the first assignment of error in Kensinger, the reasons impelling a prior adversary hearing in cases involving the seizure of presumptively constitutionally protected materials for destruction or other such purpose, as summarized in *Heller,* supra, *Roaden* v. *Kentucky,* 93 S.Ct. 2796, are simply not present in this case.

Appellant argues, further, that probable cause did not exist for the issuance of the search warrant; that the informant's reliability was not supported; that the facts failed to establish that a crime was being committed at the time the warrant issued; that the warrant failed to meet Fourth Amendment specificity requirements and failed to satisfy First and Fourth Amendment particularity requirements, and that the search conducted by the executing officers was a general search.

Fundamentally, it is required that the officer authorizing the search of premises be neutral and detached and that the information given him by an affiant be sufficient to enable him to make an independent judgment that probable cause exists to issue the warrant. *State* v. *Haynes* (1971), 25 Ohio St. 2d 264.

The standard of reasonableness for obtaining a search warrant has been set forth in *Aguilar* v. *Texas,* 378 U.S. 108, and *Spinelli* v. *United States,* 393 U.S. 410. Where the search warrant is issued pursuant to an informer's tip, the affidavit must: (i) set forth such of the underlying circumstances as may be necessary to enable the magistrate to judge the probable validity of the informant's conclusions; and (ii) some indication of the trustworthiness of the informant.

Here, the informant was a former employee of Queen City News, Inc. who knew what materials were stored in

the warehouse and who had delivered such as a route man serving customers. We believe that the "two pronged" test was met and that the affidavit is sufficiently detailed as to meet the requirements of law. Our examination of the record leads us to conclude that the tipster's information was not stale. The affiant had observed appellant conducting business, had received information about the character of that business and had verified by personal observation that at least one visible item was a publication which, in his opinion, was obscene. Such facts, coupled with the background afforded by the informant, clearly negate appellant's protests that there was nothing before the magistrate to establish probable cause that any crime was being committed.

It is equally apparent that where, as here, only single samples of a large inventory of many types of publications and other goods are seized to be used as evidence in a proceeding to follow and where, as here, such items have been identified with sufficient specificity and particularity in the warrant to search, such search is lawful and is not a general search.

Accordingly, we find the third assignment of error not to be well taken.

IV.

In this assignment, appellant asserts that the materials upon which the indictment was based were "protected expression under the First and Fourteenth Amendments to the United States Constitution" and that the prosecution totally failed to meet its burden of proof of obscenity.

It can no longer be gainsaid that obscene material is not speech entitled to First Amendment protection. *Paris*

Adult Theater I v. *Slaton*, 93 S.Ct. 2628; *Miller* v. *California*, 93 S.Ct. 2607; *United States* v. *Roth*, 354 U.S. 476.

In deciding *Slaton*, the court pointed out at pages six and seven of the opinion:

> "Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the question."

Then, the record before us when viewed in the light of what we understand the law to be, clearly demonstrates that this assignment of error is without merit. See, also, the rulings upon the second and fifth assignments of error in Kensinger, supra.

V.

This assignment alleges that the prosecution failed to ruling the motion for acquittal upon the ground that the prosecution had failed to prove all of the essential elements of the offense charged.

The thrust of the argument advanced by appellant echoes that given in support of the fourth assignment.

We have examined the record, including the publications and materials in question, and are compelled to conclude that there is therein substantial credible evidence of probative value as to each element of the offense charged. Therefore, and for the reasons given above in our ruling on the fourth assignment, the fifth assignment is not well taken.

VI.

The sixth assignment reasserts the contention that the materials received into evidence are constitutionally protected. It is without merit for the reasons given in rulings upon the fourth assignment herein, and in our rulings upon the fifth and sixth assignments of error in Kensinger.

VII.

This assignment is that the trial court erred in overruling appellant's objections to admission into evidence of subpoenaed documents. It is urged that the subpoena *duces tecum* of corporate records consisting of personnel and payroll records and delivery sheets was (a) illegally issued; (b) invalidly served, and (c) that the records were erroneously received into evidence.

The State first attempted to serve an alleged statutory agent, but the agency was denied by the purported agent. Then, the State dropped a subpoena through the mail slot of the warehouse premises. Lastly, the State served an employee of the corporation on the loading dock of the warehouse.

Upon instruction of the court after conference with counsel, counsel for Queen City brought the records into court, but protested their production.

Although a number of cases are cited in support of branch (a) of the argument, with none of which do we disagree, we are not persuaded that corporation records cannot be subpoenaed in a criminal case. It must be remembered that the records were not seized but were sought to be produced by valid process.

Secondly, service upon the employee, under all the circumstances disclosed by the record, was sufficient.

The contention that the documents were erroneously received raises the essential question of protection afforded the corporate and individual defendants in the case by the Fifth Amendment to the Constitution of the United States.

In *Wilson* v. *United States,* 221 U.S. 361, it was observed:

> ". . . [the corporation] cannot resist production [of books and papers] upon the grounds of self-incrimination. Although the object of the inquiry may be to detect the abuses it has committed, to discover its violations of law and to inflict punishment . . ., it must submit its books and papers to duly constituted authority when demand is suitably made."

The Ohio Supreme Court adopted this view and quoted extensively from *Wilson,* supra, in deciding *In re Bott,* 146 Ohio St. 511. At page 518 of the unanimous opinion in that case, we find:

> ". . . an officer of a corporation cannot refuse to produce its records in his possession, upon the plea that they either will incriminate him or may incriminate it."

This concept has been refreshed in *State* v. *Pussycat Cinex* (1973), 36 Ohio St. 2d 108, which cites *Wilson,* supra.

The privilege against self-crimination is then, not available to a corporation. Therefore, the seventh assignment of error is not well taken. Parenthetically, we note that this question as it pertains to the individual defendant-appellant will be discussed below.

VIII.

This assignment relates to the charge to the jury, the contention being that it violated the First and Fourteenth Amendments to the United States Constitution. Essentially, the arguments in support of this assignment parallel those advanced with reference to the seventh assignment of error in Kensinger. We find this assignment not to be well taken for the reasons given in our rulings upon the third and seventh assignments of error in Kensinger. Here, as in Kensinger, the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio Revised Code, and otherwise in its general duties and prerogatives.

IX.

Here, appellant claims that the court erred in limiting voire dire examination of the jury by defense counsel.

It is argued that rights accruing under the Fourteenth Amendment were denied because the court limited efforts of counsel to "probe the attitudes of prospective jurors" regarding, inter alia, "contemporary community standards of depiction of sexual material", "shifting views of frankness" and morality in depiction of sexual subject matter, "depth of feelings regarding obscenity of depiction", and attitudes about determining the dominant theme and redeeming social value of "sexually oriented" publications.

Examination of the jury upon voire dire begins at page 196 of the transcript of the proceedings and concludes at page 610. The initial impression we received upon our examination of this part of the record is that the judge presiding exhibited patience, restraint and stamina. He

permitted wide latitude to both defendants before the bar in their searching examination of prospective jurors. We find nothing to sustain their claim that the court abused its discretion or that strictures placed upon interrogation of the panel in ruling upon objections by the State prejudiced the accused.

The ninth assignment is not supported by the record and is not well taken.

X.

The tenth assignment is that the trial court erroneously denied defense counsel inspection of grand jury minutes.

The Supreme Court of Ohio recited the general rule to be applied when inspection of grand jury minutes is sought in its decision in *State* v. *Laskey,* 21 Ohio St. 2d 187, at page 191 of the per curiam opinion:

> "Generally, proceedings before a grand jury are secret and an accused is not entitled to inspect grand jury minutes before trial for the purpose of preparation or for purposes of discovery in general."

The court referred in *Laskey* to the rule in *State* v. *White* (1968), 15 Ohio St. 2d 146, declaring that:

> "The *White* rule contemplates a limited investigation for the purpose of determining whether inconsistencies exist between a witness' prior statements and his testimony at trial. Such investigation can be made only after the witness testified at trial, and, generally, cannot be used by an accused for ascertaining the evidence of the prosecution for the purpose of trial preparation. It is a discovery device only for the purposes of impeachment upon cross-examination."

See, also, *State* v. *Patterson,* (1971) 28 Ohio St. 2d 181, especially syllabus three.

In this case, appellant sought inspection of the minutes to "test the foundation upon which the indictment was grounded", arguing that "there is no unequivocal evidence in the record indicating that the grand jury returned the . . . indictment . . . upon a review of the 41 respective items supportive of the counts therein contained".

We do not discern from the record that the appellant has demonstrated the particularized needs required by the rule in *White* and *Laskey* and, consequently, are constrained to conclude that the assignment of error is not well taken.

Supplemental Assignments of Error:

XI.

Queen City urges herein that the affirmance of the conviction would violate due process and ex post facto prohibitions.

This assignment reflects the issues broached in the third and tenth assignments of error in Kensinger and is found not to be well taken for the reasons given therein.

XII.

Here, appellant claims again that the statutes under which it was charged are void for overbreadth or vagueness. It is not well taken for the reasons set forth in our ruling upon the first assignment of error herein and in the third and fourth assignments in Kensinger.

XIII.

The thirteenth assignment restates the issues raised by the third and fourth assignments of error herein and is not well taken for the reasons given therein.

Therefore, the judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, Queen City News, Inc. is affirmed.

Assignments of Error, John Marshall:

I.

In his first assignment of error, appellant, John Marshall, asserts that the search and seizure at the warehouse of Queen City News, Inc. was an unreasonable search and seizure.

While this assignment is prolix, we find that it raises the same, or very similar, issues brought before us in the third assignment of error in the appeal of Queen City News, Inc. Hence, we find this assignment of error by appellant, John Marshall, not to be well taken for the reasons given in our ruling hereinbefore on the third assignment of error of Queen City.

II.

This assignment is that the court erred in admitting publications into evidence where no evidence was presented establishing obscenity of the items.

The same question has been considered and ruled upon in Queen City's appeal with respect to the fourth and sixth assignments therein and in the appeal of Michael Kensinger with respect to the second and fifth assignments of error in that case.

Accordingly, this assignment is found to be without merit for the same reasons.

III.

The appellant asserts, here, that Sections 2905.34 and 2905.35, Ohio Revised Code, are unconstitutional and re-

pugnant to the First and Fourteenth Amendments to the Constitution of the United States.

The same issue was raised by Queen City and Kensinger and this assignment by Marshall is held to be without merit for the reasons given in our rulings on the first assignment of Queen City and the third and fourth assignments of error by Kensinger.

IV.

Here, appellant questions whether the proof by the State demonstrated that the publications were not protected against State regulation by the First and Fourteenth Amendmens.

We have ruled on the same proposition in the first and second assignments of error by Queen City herein and in the third and fourth assignments in Kensinger. Therefore, the assignment of error by Marshall is not well taken for the same reasons.

V.

This assignment alleges that the prosecution failed to establish a prima facie case. It is not well taken for the reasons given above on the fourth and sixth assignments of Queen City and the second and fifth assignments in Kensinger.

VI.

Here, appellant urges that the court erred in not dismissing the cause at the conclusion of defendant's case, where the State offered no rebuttal evidence.

It is not well taken for the reasons given by us in disposing of the fifth and sixth assignments in Kensinger and the fourth and sixth assignments of Queen City herein.

VII.

The seventh assignment of error is identical in its essential thrust to the seventh assignment of error by Queen City is it relates to the admission of the corporate records of Queen City News, Inc.

A similar assignment numbered seven has been made by Queen City and ruled upon above as it pertains to that appellant, and to the degree that our rulings therein apply to Marshall, individually, they are adopted here.

When the entire transcript of the proceedings is considered, it is clear that it was never disputed that appellant, John Marshall, was connected with the operation of the business of Queen City News, Inc. He was at the warehouse when the warrant to search was executed and the seizure effected and had been there the day before. The essence of the defense was not that the accused did not possess the materials but they were not obscene and therefore protected.

We view the admission of the corporate records as being cumulative, at most, and are able to discern no ground upon which to determine that the appellant, Marshall, was prejudiced thereby, either by the records having been received in evidence or by the possibly contradictory remarks of the court to counsel. Hence, the assignment of error is without merit.

VIII.

This assignment challenges the instruction to the jury on the "national contemporary community standard", and appellant contends, inter alia, that the jury was misdirected on the issues of "dominant theme-prurient appeal" and "redeeming social value".

We find the eighth assignment of error not to be well taken for the reason that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases. For an expansion of this fundamental reason, attention it directed to our rulings in the seventh and third assignments in Kensinger and the eighth assignment in the appeal of Queen City.

IX.

This assignment asserts that the record establishes the bias of the trial court which denied defendant's right to effective counsel and to a fair and impartial trial.

We find the assignment not to be well taken because the record, considered in its totality, fails to support the assigned error in any of its particulars.

X.

The tenth assignment by Marshall is the same in its thrust and import as the tenth assignment by Queen City based upon denial of access to grand jury minutes and is without merit for the reasons given in our ruling in Queen City's appeal.

XI.

This assignment asserts that the court prejudiced Marshall in restricting inquiry to the venire. It is without merit for the reasons given in our rulings upon the ninth assignment in the appeal by Queen City.

XII.

Here, appellant contends that the court violated his rights granted by the Fifth and Fourteenth Amendments

to the Constitution of the United States by "commenting on the failure of the defendant to testify in his own behalf" during its instruction to the jury.

The court stated to the jury:

> "It is not necessary that a defendant take the witness stand in his or its own defense. He has a constitutional right not to testify. The fact that the defendant or defendants did not testify must not be considered for any purpose nor should any inference be drawn therefrom."

We believe the better practice to be for the court not to so instruct, but when the charge as a whole is considered the inclusion of the quoted language does not constitute prejudicial error.

Therefore, the assignment is not well taken.

XIII.

This assignment is, essentially, that Marshall was denied constitutional rights because the publications were not read to the jury and that since the jury "deliberated for a total of four hours and forty-six minutes" it follows necessarily that the jury could not have read and considered the materials submitted as evidence.

There is nothing in the record from which we could conclude that the jury was guilty of misconduct without indulging in improper speculation. There is nothing to demonstrate how the jury reached the verdict and it must be presumed that the result was reached in harmony with the instructions of the court and according to law. The general rule to be applied is that no judgments of conviction will be reversed unless it appears affirmatively from the record that the accused was prejudiced. We find no such affirmative demonstration and must conclude that the assignment is not well taken.

XIV.

The ground of this assignment of error has been disposed of in our ruling on the eighth assignment of error in Kensinger and the reasons there given are adopted here.

XV.

Here, Marshall asserts that the verdict is manifestly against the weight of the evidence and contrary to law.

We have examined the record, including the publications and materials in question, and have concluded that there is present in the record substantial evidence of probative value as to each element of the crime charged. Accordingly, the assignment is not well taken.

XVI. (Supplemental)

The assignment of error is that the constitutional test (*Memoirs*) has been "completely and totally repudiated" in *Miller* v. *California*, 93 S.Ct. 2607. It is not well taken for the reasons given in the disposition of the third and tenth assignments in Kensinger and adopted in the eleventh assignment in the appeal of Queen City.

The judgment of the Court of Common Pleas of Hamilton County, Ohio, as it pertains to appellant, John Marshall, is affirmed.

HESS, P. J., SHANNON and PALMER, J.J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

OPINION OF COURT OF APPEALS IN COMPANION CASE

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

No. C-73008

STATE OF OHIO,
Plaintiff-Appellee,

vs.

MICHAEL KENSINGER,
Defendant-Appellant.

DECISION

(Dated January 14, 1974)

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries, and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of proceedings, the assignments of error, briefs and arguments of counsel.

Appellant presents by way of brief and supplement thereto, ten assignments of error alleged to have occurred in connection with or during the course of a jury trial resulting in the conviction of defendant-appellant under Section 2905.35, Ohio Revised Code, a misdemeanor section pro-

scribing the production or dissemination of obscene material. These assignments of error will be considered below in the order raised by appellant.

I.

Appellant asserts a denial of rights under the First and Fourteenth Amendments of the Constitution of the United States, an unlawful arrest, and an unconstitutional prior restraint on protected materials, where there was no antecedent "judicially supervised adversary hearing" before the arrest and trial of appellant on the issue of the claimed obscenity of certain publications.

The publications in question, "Obscene! A New Definition For The New-Generation" and "Perversions" were purchased by an officer of the Cincinnati Police department, in plain clothes in an adult bookstore on Seventh Street in downtown Cincinnati. The two publications were offered for sale to the officer by appellant, who was working behind the raised stand or counter inside the store, and who, after some conversation with the officer while the latter perused the publications on the rack, stated to the officer: "If you are looking for something good, look at these", handing him the two publications in question and breaking the plastic seal on them as he did so. The officer, after looking at the publications, tendered the purchase price to appellant, who accepted it. The officer then took his purchases out of the bookstore and, in due course, to the grand jury, which thereupon returned its indictment against "John Doe", subsequently identified as appellant.

This Court has had occasion previously to examine and to reject, under circumstances resembling the foregoing, the asserted necessity for an antecedent adversary hearing. *State* v. *Cornett*, 32 Ohio App. 2d 211. We find nothing in

the law since the release of that opinion to require us to change our conclusion expressed there, that no constitutional, statutory, or other inhibition or prohibition exists to frustrate or taint the procedure followed in this case. It may be noted that, like *Cornett*, supra, and unlike *Heller* v. *New York*, 93 S.Ct. 2789, *Roaden* v. *Kentucky*, 93 S.Ct. 2796, and other authorities cited by appellant, no Fourth Amendment involvement in search and seizure arises in this case. The material was offered to an officer lawfully on the premises as a business invitee, was accordingly purchased by him and thereafter removed by him with the consent of the owner's agent. Nothing was "seized" in a sense requiring a search warrant, or an adversary judicial determination to protect fragile First and Fourteenth Amendment rights. The reasons impelling a prior adversary hearing in cases involving the seizure for destruction or other such purpose of presumptively constitutionally protected materials, as summarized in the *Heller* and *Roaden* cases, are simply not, in our view, present here. Acordingly, appellant's first assignment of error is overrued.

II.

Appellant's second assignment of error asserts error in the admission of the two publications into evidence without contemporaneous testimony and evidence bearing on the issue of the obscenity of the publications. Thus, argues appellant, the State may not rely solely upon the publications themselves to demonstrate their own obscenity, but must accompany such exhibits with independent testimony relating such publications to the specific obscenity tests or standards then applicable.

We do not so understand the law. As stated in the majority opinion in *Paris Adult Treater I* v. *Slaton*, 93 S.Ct. 2628:

"Nor was it error to fail to produce 'expert' affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence . . . the films, obviously, are the best evidence of what they represent. In the cases in which this court has decided obscenity questions since *Roth*, it has regarded the materials as sufficient in themselves for the determination of the questions."

Appellant's second assignment of error is without merit.

III.

Next, appellant asserts that the statutes under which appellant was indicted, tried and convicted, Revised Code Sections 2905.34 and 2905.35, construed in pari materia, are facially unconstitutional and have been applied in an unconstitutional manner, in contravention of the First and Fourteenth Amendments. However, in *State, ex rel. Keating* v. *Film Entitled "Vixen"*, 27 Ohio St. 2d 278, the Supreme Court of Ohio considered the issue of these two enactments against the requirements of the First Amendment of the U. S. Constitution and the Ohio Constitution and found no conflict therein either "facially", nor as they were involved in that case, in a nuisance abatement action under Revised Code Section 3767.01 et seq. The court stated:

"Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse." (p. 283).

* * * * *

"This two sections, now the law of Ohio, when construed together and applied to the instant facts, effectively provide that . . . So stated, they proscribe

> conduct which 'bears no necessary relationship to the freedom to speak, write, print, or distribute information or opinion.' *Schneider* v. *State* (1939), 308 U.S. 147, 161."

In the body of the *Vixen* decision, the court cited both *Roth* v. *United States*, 354 U.S. 476, and *Memoirs* v. *Massachusetts*, 383 U.S. 413 which, as pointed out in the dissent of Judge Corrigan, supplied the definition of obscenity required by the Supreme Court of the United States to be applied in the trial of that, as in this, case. We can find no reason or authority to require us to find Revised Code Sections 2905.34 and 2905.35 facially unconstitutional. *State* v. *Mazes*, 7 Ohio St. 2d 136; *State* v. *Blair*, 32 Ohio St. 2d 237.

Nor do we find them unconstitutionally applied under the record of this case; certainly not, as appellant argues, because they "impose a standard equally applicable to juveniles and adults alike, thereby reducing the adult standard to that of a juvenile standard", since, from the statutory scheme, it may as readily be argued that the juvenile standard is *raised* to that of the adult standard. In any event, the State has been held to have a legitimate concern in both areas, and we find no reason why such concern may not be expressed in the fashion adopted by the legislature here. *Paris Adult Theater I* v. *Slaton*, 93 S.Ct. 2628 (slip opinion at pp. 7-8).

As to appellant's argument, raised in his Supplementary Brief, that the recent decision by the Supreme Court of the United States in *Miller* v. *California*, 93 S.Ct. 2607, so repudiated the former *Roth-Memoirs* obscenity test as "unworkable" and as casting a burden on the State "virtually impossible to discharge", that any conviction secured thereunder is necessarily infirm, we must disagree. We have been cited to no authority and have discovered none

which would prohibit a State from enacting or requiring a more *stringent* or difficult-to-prove test for obscenity than that currently deemed permissible under the First and Fourteenth Amendments. If *Miller* has now eased two of the *Memoirs* tests so that the State is no longer required to establish that the materials are "utterly without redeeming social value", but may instead show that the material "taken as a whole, does not have serious literary, artistic, political, or scientific value", and if the State is no longer required to offer evidence of nor the trial court to charge on "national standards", but where obscenity may be determined by applying "contemporary community standards" instead, we are aware of no prejudice to a defendant found guilty by a jury, under competent and probative evidence to sustain it, pursuant to a charge by the trial court requiring it to find the materials to be *utterly* without redeeming social value viewed in the context of national standards. Not, in any event, unless we are required to find that *Miller* declared the old test to be *absolutely* impossible to apply and, therefore, all convictions secured thereunder to be suspect and perhaps voidable. We find nothing in *Miller* to require this drastic view.

We may note, in passing, the remand of the above *Vixen* decision which was decided under the *Roth-Memoirs* rule, by the Supreme Court of the United States to the Supreme Court of Ohio, for consideration in the light of *Miller*, and the reaffirmance thereof by the latter, stating:

> "This court is of the opinion that the statutes applied in this cause initially by the court comport with the standards enunciated in *Miller*."

State ex rel. Keating v. *"Vixen"*, 35 Ohio St. 2d 215. We find, therefore, as did apparently the Supreme Court of

Ohio, no fatal conflict in a conviction secured under criminal statutes limited and applied to conform to the *Roth-Memoirs* test, where such statutes are also held subsequently to comport with the broader *Miller* test.

As to appellant's argument that the *Miller* test may not be retroactively applied to sustain the instant judgment, we defer discussion to our disposition of appellant's tenth assignment of error.

Appellant's third assignment of error is not well taken and is accordingly overruled.

IV.

In his fourth assignment of error, appellant argues that the absence from the record of any evidence on behalf of the State of "pandering", of distribution of materials to juveniles, and/or evidence or proof of any mode of distribution of materials in a manner that an unwilling adult could not avoid exposure, resulted in a failure to remove the materials from the protection of the First and Fourteenth Amendments, requiring favorable action by the trial court on various motions to strike and to dismiss appellant. This argument appears to derive from *Redrup* v. *New York*, 386 U.S. 773, when the court reversed several obscenity convictions from various states, pointing out in its terse opinion that none of the cases considered involved areas of control which the Supreme Court had previously held to be legitimate areas of state concern, for example, a specific and limited statutory concern for juveniles, assaults upon an individual's right of privacy by obtrusive display of offensive materials, and "pandering" in the *Ginzburg* sense. We do not read *Redrup*, however, as any indication of intent to *limit* a State's ligitimate concern to the three specific areas mentioned, and to preclude all others. And, indeed, this appears to be clearly confirmed

in *Paris Adult Theater I* v. *Slaton,* supra, where the court rejected the argument that the films in question acquired constitutional immunity where they were exhibited solely to consenting adults, with no evidence of pandering or invasion of privacy of the non-consenting public generally. Said the court:

> ". . . this Court has never declared these to be the only legitimate state interests permitting regulations of obscene material."

Appellant's fourth assignment of error is accordingly overruled.

V.

Next, appellant argues that the trial court erred in failing to grant appellant's motion to dismiss at the conclusion of the States case for failure to establish a prima facie case. To the extent that appellant's argument under this assignment is directed toward the alleged necessity for the introduction by the State of evidence of distribution to juveniles, invasion of privacy, or pandering, the assignment is answered by our disposition of assignment of error numbered four above. The balance of this prolix assignment of error and argument thereunder is addressed to the alleged failure of the State to adduce evidence sufficient to constitute a prima facie case, of the three elements required by the *Roth-Memoirs* cases for the proscription of obscenity, and of their coalescence therein. Since we understand the law to be that the publications are themselves the best evidence of their own character, and, where placed before the triers of the facts under proper instructions, do not require expert or other commentary or formal gloss, or testimony relating them to national contemporary community standards, we find the balance of this assign-

ment of error to be without merit. *Paris Adult Theater I* v. *Slaton,* 93 S.Ct. 2628 (slip opinion at pp. 6-7, esp. footnote 6 on p. 7).

VI.

The appellant's sixth assignment of error argues that the trial court erred in not dismissing the case at the end of appellant's case, where the State offered no evidence in chief, nor rebuttal evidence, as to the presence of the three elements required under *Roth-Memoirs* decisions, and of their coalescence therein. Since, as previously noted, the publications were themselves placed in evidence and were before the jury to consider, for the reasons noted in our disposition of assignment of error numbered five above, we find no error in the failure of the trial court to dismiss this cause at the conclusion of appellant's case. Accordingly, appellant's sixth assignment of error is overruled.

VII.

Appellant's seventh assignment of error addresses itself to alleged error in the trial court's charge to the jury, namely, in refusing to give certain charges specifically requested, in erroneously charging on national community standards, on the elements of obscenity and scienter, and in refusing to respond properly to a question posed by the jury. A careful reading of the charge by the trial court convinces us that the jury was adequately and properly instructed in the law relating to obscenity as set forth in the then applicable *Roth-Memoirs* cases, in the elements of the offense under the Ohio statute, and generally in its responsibiities and duties as triers of the facts. Those charges specially requested by appellant and refused by the trial court were denied as either subsumed in the

general charge and therefore redundant, or as otherwise improper or misleading. We find no error prejudicial to appellant in their refusal, nor in the response by the trial court to the query of the jury. As to appellant's argument, contained in his Supplemental Brief, that the *Miller* decision fatally weakens any conviction not under the *Roth-Memoirs* test, we refer to our examination of this issue in appellant's third assignment of error.

Appellant's seventh assignment of error is overruled.

VIII.

Next, appellant argues that the "systematic exclusion" of young jurors from service on juries dealing with obscenity cases violated appellant's right to an impartial jury under the Sixth and Fourteenth Amendments of the Constitution of the United States. The record reveals that the customary procedure was followed in this case, of using a 1970 poll book to draw at random a venire of potential jurors. No suggestion is made, and none is present in the record, that any legal or constitutional irregularity exists with respect to venire so selected or to the method of selecting it, *except* to the extent that it necessarily excluded those under twenty-one years of age (twenty-three years at the time of trial in 1972) not then eligible to vote and therefore not included in the 1970 poll books. We find this procedure totally unlike the purposeful and systematic exclusion of racial groups held improper in *Swain* v. *Alabama,* 380 U.S. 202, and have been directed to no authority which would require us to hold otherwise. Indeed, the argument advanced by appellant invites a reductio ad absurdum rejoinder: If we must constitutionally include eighteen year olds to make up an impartial jury, why not sixteen year olds, who, after all, are permitted, under cer-

tain circumstances, to marry; or fourteen year olds who have achieved (or suffered) puberty; and if registered voters are incuded, why not citizens not so registered, including those imprisoned for crimes? It is obvious to us that some technically feasible method for selecting potential jurors reasonably calculated to secure and which does in fact secure a random unpremeditated sampling of citizens will, together with other protective procedures such as voir dire examination, peremptory challenges and challenges for cause, and the presence of an impartial magistrate instructing the jury on matters of law and procedure, satisfy the requirements of the Sixth and Fourteenth Amendments for an impartial jury, without the necessity of finding twelve persons precisely proportioned in age, sex, race, socioeconomic status, religion, etc. to their larger counterparts in society. Appellant's eighth assignment of error is without merit.

IX.

Appellant's ninth assignment of error asserts that the verdict is against the manifest weight of the evidence and is contrary to law. We have examined the record, including the publications in question, and have concluded that there is present in the record substantial credible evidence of probative value as to each element of the offense charged. Appellant's ninth assignment of error is accordingly overruled.

X.

Finally, appellant asserts by way of his tenth assignment of error, that the constitutional test formulated by the Supreme Court of the United States, incorporated into and applied by the State in the prosecution of this case (that is, *Memoirs* v. *Massachusetts,* 383 U.S. 413), was "com-

pletely and totally repudiated" by the Supreme Court in *Miller* v. *California*, 93 S.Ct. 2607, and that the retroactive application of the *Miller* test to sustain the instant judgment would offend the Fourteenth Amendment of the Constitution of the United States.

The point is not contested by the appellee, the State arguing that the retroactive application of *Miller* is not sought by the appellee and that the judgment against appellant should and can be sustained on the basis of existing law at the time of the convictions. This position impliedly argues that *Miller* did not so "completely and totally repudiate" the previous obscenity test *that any conviction secured thereunder* is necessarily infirm. We agree, for the reasons in our dispositon of appellant's third assignment of error. Accordingly, we overrule appellant's tenth assignment of error.

It is, therefore, the order of this Court, that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

HESS, P. J., SHANNON and PALMER, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

Relevant Provisions of Ohio Revised Code

[Former] O.R.C. 2905.34

"No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawing, representation, figure, image, cast, instrument, or article of an indecent or immoral nature, or drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts, of criminal deeds, or pictures and stories of immoral deeds, lust, or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars, or imprisoned not less than one nor more than seven years, or both."

§ 2905.34 Definitions.

As used in sections 2903.13 to 2903.16, inclusive, and sections 2905.34 to 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement, or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educationa, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture fim, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

§ 2905.35 [Production or dissemination of obscene material or performances.]

No person, with knowledge of the content and character of the obscene material or performance involved, shall make, manufacture, write, draw, print, reproduce, or publish any obscene material, knowing or having reasonable cause to know that such material will be sold, distributed, circulated, or disseminated; or sell, lend, give away, distribute, circulate, disseminate, exhibit, or advertise any obscene material; or write, direct, produce, present, advertise, or participate in an obscene performance; or possess or have in his control any obscene material with intent to violate this section; or offer or agree to do any act in violation of this section, or cause any such act to be done by another.

Whoever violates this section shall be fined not more than five thousand dollars or imprisoned not more than one

year, or both, for a first offense, and for each subsequent offense shall be fined not more than ten thousand dollars or imprisoned not less than one nor more than seven years, or both.

§ 2905.38. [Knowledge of obscene matter, when presumed.]

(A) An owner or manager of a theater, bookstore, magazine stand, or other commercial establishment engaged in the business of selling materials or exhibiting performances, who, in the course of business possesses six or more identical or substantially similar obscene articles, having knowledge of their content and character, is presumed to possess them with intent to violate section 2905.35 of the Revised Code.

(B) An owner or manager of a theater, bookstore, magazine stand, or other commercial establishment engaged in the business of selling materials or exhibiting performances, who, in the course of business does any of the acts prohibited by section 2905.35 or 2905.36 of the Revised Code, is presumed to have knowledge of the content and character of the material or performance involved, if he has actual notice of the nature of such material or performance, whether or not he has precise knowledge of its content and character. Actual notice of the nature of such material or performance may be given to such person by notice in writing from the prosecuting attorney of the county or chief legal officer of the municipality in which such person resides or does business, stating that such material or performance is obscene. If such prosecuting attorney or chief legal officer obtains a declaratory judgment against such person under sections 2721.01 to 2721.15, inclusive, of the Revised Code declaring that such material or performance is obscene and publication of

such judgment is made within two days of such judgment in a newspaper of general circulation in such county or municipality, all persons residing or doing business in such county or municipality are presumed to have actual notice of the nature of such material or performance. Any person receiving the notice in writing from the prosecuting attorney of the county or chief legal officer of the municipality in which such person resides or does business may bring an action against such prosecuting attorney or chief legal officer for a declaratory judgment to determine whether such material or performance is obscene, and if judgment is rendered in favor of such person, he shall be allowed his costs.

(C) It is a defense to a charge brought under section 2905.35 of the Revised Code, that the obscene material was disseminated or the obscene performance was presented for a bona fide medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, phychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in such material or performance.

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Supreme Court of the United States

No. 74-225

October Term, 1974

JOHN MARSHALL AND QUEEN CITY NEWS, INC.,
Appellants,

vs.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioners herein respectfully move this Court for an order (1) vacating its dismissal of appeal, entered on December 16, 1974, and (2) noting probable jurisdiction, or issuing a writ of *certiorari* in the event the Court declines to note probable jurisdiction of the appeal. As grounds for this motion, petitioners state the following:

1. The Order of the Supreme Court of December 16, 1974, Dismissed the Instant Appeal.

On December 16, 1974, this Court, four justices dissenting, dismissed the appeal of petitioners for want of a substantial federal question. The instant appeal is based upon the invalidity of Ohio's obscenity law under which

petitioners were tried and convicted. Petitioners also urge in the instant appeal that other denials of their constitutional rights compel this Court's issuance of a writ of *certiorari*.

Simultaneously with its order dismissing the appeal, the Court vacated the previous order of Justice Stewart staying the execution and enforcement of the judgments of the Supreme Court of Ohio and of the sentences of petitioners. 43 U.S.L.W. 3348 (December 17, 1974). Petitioner John Marshall was sentenced to one year imprisonment and a total fine of $20,500.00; Petitioner Queen City News, Inc., was sentenced to the maximum fine of $205,000.00

The dismissal of the appeal constitutes an affirmance on the merits of the state court decisions upholding the validity of the statutes involved; but the dismissal does not constitute a decision on the merits of the other issues presented. See *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959).

Justices Brennan, Stewart, Marshall and Douglas dissented from the dismissal of the appeal, and stated that they would note probable jurisdiction and would reverse the state court decisions. Justices Brennan, Stewart and Marshall specifically noted that they did not consider whether the other questions presented in addition to petitioners' challenge to the overbreadth of Ohio's obscenity laws merit plenary review.

Petitioners urge this Court to grant rehearing of its dismissal of the appeal and to order plenary consideration of (A) the substantial federal questions presented on appeal challenging the validity of Ohio's obscenity law, and (B) the substantial federal questions presented as on petition for writ of *certiorari* challenging other denials of well-established constitutional rights.

2. The Questions Presented on Appeal Warrant Plenary Consideration.

A petition for rehearing of decisions, other than those denying or granting *certiorari*, will be granted only at the instance of a justice who concurred in such decision, and upon the concurrence of a majority of the Court. Rules of the Supreme Court of the United States, Rule 58(1); *Reid v. Covert*, 354 U.S. 1, 65-67 (1957) (Harlan, J., concurring).

By the margin of a single vote and in the absence of plenary consideration, this Court has upheld in the instant cause the validity of Ohio's statutory attempt to suppress sexually oriented materials on the basis of their alleged obscene contents. Thus the Court has rejected petitioners' urgings that as a result of such affirmance, persons of Ohio are subject to conviction, fine and imprisonment for the distribution of material constitutionally protected under the pronouncements of this Court. For, Ohio's obscenity law, on its face and as construed by the Supreme Court of Ohio, fails to require that the material be patently offensive, fails to require proof that the material lack the requisite value, and fails to accurately require that the material, *taken as a whole*, appeal to a prurient interest. Jurisdictional Statement, p. 11.

Furthermore, an accused may be convicted without proof that he had any illegal intent as to the use of the materials at issue. For under Ohio law, possession by a manager of a commercial establishment of six substantially obscene materials is deemed sufficient "proof" of intent to distribute such materials in violation of Ohio law. *Id.* at 17.

Petitioners submit that the difficult issues presented, and which have sharply divided this Court, warrant plenary consideration with the fullest opportunity for each justice to evaluate the arguments and to formulate his

views. Plenary consideration is especially compelling since similar challenges to the validity of Ohio's obscenity law are currently before this Court in *State ex rel. Sensenbrenner v. Adult Bookstore*, 35 Ohio St. 2d 220 (1973), *petition for cert. filed*, 42 U.S.L.W. 3388 (U.S. Dec. 24, 1973) (No. 73-982), and *Art Theater Guild, Inc. v. State of Ohio ex rel., Clark L. Ewing*, 37 Ohio St. 2d 95 (1974), *appeal filed*, 43 U.S.L.W. 3125 (U.S. Sept. 10, 1974) (No. 73-1973).

Petitioners urge each justice to reconsider the issues presented and to vote for rehearing and the noting of probable jurisdiction.

3. The Questions Presented as on Petition for Writ of Certiorari Warrant Plenary Consideration.

A petition for rehearing of orders on petition for writ of *certiorari* will be granted if the petition presents intervening circumstances, of substantial or controlling effect. Rules of the Supreme Court of the United States, Rule 58(2).

The other issues presented by petitioners in addition to their challenge to the validity of Ohio's obscenity law are properly before and reviewable by this Court. See *Flournoy v. Weiner*, 321 U.S. 253, 263 (1944); *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 547 (1922).

However, Justices Brennan, Stewart and Marshall specifically noted their failure to consider the other issues presented (Brennan, J., dissenting). And it appears that Justice Douglas also did not consider such issues (Douglas, J., dissenting). Furthermore, the order dismissing the appeal does not disclose how the justices who joined in the order for dismissal voted on the granting of review based upon such issues.

In support of their failure to consider the other issues presented, Justices Brennan, Stewart and Marshall relied upon Justice Brennan's dissent in *Heller v. New York*, 413 U.S. 495 (1974). But the decision of these three Justices to consider only the validity of the state obscenity law in *Heller* is inapplicable to the instant case. For in *Heller*, a majority of the Court, upon plenary consideration of the issues unrelated to the validity of New York's obscenity law, decided the case adversely to petitioner's contentions. Thus, the decision of the Court in *Heller* could not have been altered by the positions of Justices Brennan, Stewart and Marshall on different grounds, and their failure to consider these issues had no effect upon the outcome.

However, in the instant case, consideration by the three Justices of issues not previously considered by them *could* easily affect the Court's issuance of a writ of *certiorari*. For the Court may grant review upon the affirmative vote of a substantive minority of the justices. *See Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, n.2 (1959) (Douglas, J., concurring); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957), Harlan, J., concurring). And as above noted, under the current order of the Court, at least four justices have not voted on whether to grant a writ of *certiorari* in the instant case.

Thus, petitioners submit that the question of whether the other issues presented warrant plenary consideration remains undecided and compels rehearing. *Cf. Silver King Coalition Mines Company v. Conkling Mining Company*, 256 U.S. 18, 25 (1921).

The failure of each justice to vote on each issue is an adjudicatory procedure as disturbing in its implications as the substantial constitutional issues herein presented. For, each justice, unless he disqualifies himself in a particular case, is to pass upon every piece of business coming

to the Court. Mr. Justice Brennan: *State Court Decisions and the Supreme Court,* 31 Penn. Bar Assn. Q. 393, 400-406 (1960); *U.S. Const. Art III,* §1. Furthermore, the failure of the entire Court to consider all the issues is a practice which renders unworkable the Court's rule of granting review upon the affirmative vote of a substantial minority of the justices.

Petitioners urge that the Court, upon rehearing, grant plenary review. For, if the state court decisions stand as the law of Ohio, the people of Ohio will be denied well established constitutional rights in the following areas of the law:

The law of search and seizure. Search warrants for the seizure of books, magazines, and films will issue on the strength of the conclusory assertions of law enforcement officers that material is "obscene," without any scrutiny by the judge issuing the warrant of any of the materials to be or actually seized;

Warrants will issue routinely authorizing the seizure of "obscene materials" in the language of the statute; but not a single publication will be specified;

Without direction or instruction, law enforcement officers will rummage through thousands of publications; Each of the law enforcement officers executing the search warrant will decide in his own unfettered discretion what is "obscene" and to be seized, and thus will conduct a general search and seizure.

Law enforcement officers will conduct mass seizures pursuant to a search warrant issued in the absence of a prior adversary hearing;

And, the search warrant will have issued without sufficient underlying facts to support either the accusations of an unreliable informant or the belief of the affiant in such informant's reliability or credibility.

These practices will be the law of Ohio despite the admonitions of this Court in *Marcus v. Search Warrants*, 367 U.S. 717 (1961). If the Court does not grant review, the differences between the law pronounced in *Marcus* and the law practiced by the State of Ohio will be intolerable. If the Court now intends to limit its holding in *Marcus*, it should do so only upon plenary consideration.

Proof of scienter as an element of the crime charged. Convictions will be obtained, as in the instant case, without any proof whatever that the defendant had knowledge of the character and content of the materials at issue, or had any illegal intent as to the use of such materials. If the Court now intends to overrule its holding in *Smith v. California*, 361 U.S. 147 (1959), it should do so only upon plenary consideration.

Jury instructions in obscenity cases. The trier of fact will judge the presence of obscenity based upon what is fit for a child to read. If the Court now intends to limit its decision in *Butler v. Michigan*, 352 U.S. 380 (1957), it should do so only upon plenary consideration of the issue.

Rules of voir dire of a jury panel. Prospective jurors who, in reply to the court's inquiry, state they can render a verdict according to the law and instructions given by the Court will be empanelled notwithstanding their hidden prejudices and biases. If the Court now intends to limit its decision in *Irvin v. Dowd*, 366 U.S. 717 (1961), as to the right of defense counsel to conduct a sufficient *voir dire* examination of the jury to probe their hidden prejudices, as to sexually oriented material, it should do so only upon plenary consideration of the issue.

This Court should not summarily dismiss the fore-

going claims of substantial denials of constitutional rights. Petitioners urge this Court to continue its invariable practice of long duration and to grant plenary review of the foregoing issues upon the affirmative vote of four or more justices. *See Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15 (1959) (Douglas, J., concurring); *Ohio ex rel. Eaton v. Price*, 360 U.S. 246 (1959).

The "rule of four" is a safeguard, self-imposed by the Court, to prevent unduly limiting access to the Court; if a substantial minority of the justices determine that a case presents questions that are review-worthy, the case warrants plenary consideration. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 560 (1957) (Harlan, J., concurring); *Harris v. Pennsylvania Railroad Co.*, 361 U.S. 15, n.3 (1959) (Douglas, J., concurring).

CONCLUSION

For the reasons set forth above and in their jurisdictional statement, petitioners urge this Court to grant rehearing and, upon such rehearing, to note probable jurisdiction, or to issue a writ of *certiorari* in the event the Court declines to note probable jurisdiction of the appeal.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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Counsel for Petitioners